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Supreme Court, U.S.
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IN THE

Supreme Court of the United States

DWIGHT J. LOVING,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

PETITION FOR A WRIT OF CERTIORARI

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CAPITAL CASE

QUESTIONS PRESENTED

1. Whether, prior to applying the ineffective assistance of counsel test of *Strickland v. Washington*, 466 U.S. 668 (1984), a court considering a habeas petition must determine if a petitioner's claim should be evaluated subject to a presumption of evidentiary prejudice, if prejudice due to the passage of time has been alleged.

2. Whether the U.S. Court of Appeals for the Armed Forces contravened the directives of *Barker v. Wingo*, 407 U.S. 514 (1972) and *Doggett v. United States*, 505 U.S. 647 (1992) when it failed to assess appropriateness of, let alone apply, a presumption of evidentiary prejudice following more than a decade of delay in the conduct of a post-conviction hearing concerning ineffective assistance of counsel in presenting mitigation evidence in a capital sentencing proceeding.

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Dwight J. Loving ("Loving"), a military death-sentenced Army private whose sentence was affirmed by this Court on direct review in *Loving v. United States*, 517 U.S. 748 (1996) but whose case remains pending before the President for final review pursuant to the Uniform Code of Military Justice("U.C.M.J."), respectfully petitions for a writ of certiorari to review the denial of his petition for extraordinary relief in the nature of a writ of habeas corpus by the United States Court of Appeals for the Armed Forces.

OPINIONS BELOW

The July 17, 2009 opinion of the court of appeals is reported at 68 M.J. 1 (C.A.A.F. 2009). (App., *infra*, 1a-78a). The court of appeals denied a petition for reconsideration by order issued September 1, 2009. (App., *infra*, 106a-107a). The *DuBay* Hearing Findings of Fact and Conclusions of Law (App., *infra*, 79a-105a), upon which the opinion of the court of appeals is based in part, is unreported.

JURISDICTION

The court of appeals issued its opinion on July 17, 2009. A motion for reconsideration was denied on September 1, 2009. On November 20, 2009, The Chief Justice extended the time within which to file a petition for a writ of certiorari to and including December 30, 2009. On December 23, 2009, The Chief Justice further extended the time to January 29, 2010. The jurisdiction of this Court is invoked under 28 U.S.C. § 1259(4) (2006).[1]

[1] 28 U.S.C. § 1259 (2006) provides, in part:

> Decisions of the United States Court of Appeals for the Armed Forces may be reviewed by the Supreme

(Cont'd)

CONSTITUTIONAL PROVISION INVOLVED

The Fifth Amendment to the United States Constitution states:

> No person shall . . . be deprived of life, liberty, or property, without due process of law . . . .

(Cont'd)

> Court by writ of certiorari in . . . (4) Cases, other than those described in paragraphs (1), (2), and (3) of this subsection, in which the Court of Appeals for the Armed Forces granted relief.

In this case, the court of appeals ordered an evidentiary hearing before a military judge to address matters related to the defense investigation of Loving's background and other matters that may have produced evidence in either extenuation or mitigation during Loving's capital sentencing proceeding. The military judge entered findings of fact and conclusions of law, which were returned to the court of appeals for consideration. This is the kind of "relief" recognized by this Court in *United States v. Denedo*, — U.S. —, 129 S.Ct. 2213, 173 L.Ed.2d 1235 (2009). In particular, the Court explained in *Denedo* that "relief" encompasses any "redress or benefit" provided by a court. *Denedo*, 129 S.Ct. at 2219. The court of appeals' decision to order an evidentiary hearing conferred a "palpable benefit" to Loving, as in *Denedo*, because it allowed the court to "determine anew if the writ should issue" and created "a chance of success on the merits [that], however slight, is superior to no possibility at all." *Id.* at 2220.

STATEMENT OF THE CASE

Over seventeen years after a court-martial pronounced Loving's death sentence, the court of appeals acknowledged the potentially deficient nature of the mitigation evidence developed on behalf of Loving:

> Petitioner has presented a potentially meritorious claim of ineffective assistance of counsel arising from his trial defense counsel's failure to conduct a reasonable investigation, for not pursuing leads known to the trial defense counsel relevant to this matter, and for not expanding the mitigation investigation into the defendant's traumatic life history. Petitioner has produced post-trial material which raises substantial questions about the reasonableness of the investigation upon which our 1994 decision rested.

Loving v. United States, 64 M.J. 132, 151-52 (C.A.A.F. 2006). The court of appeals also acknowledged the failure to earlier grant an evidentiary hearing concerning the deficient mitigation investigation:

> Petitioner did not have an adequate opportunity on direct appeal to establish facts in an evidentiary hearing to support his ineffective assistance of counsel claim.

Id. at 148. Yet the court of appeals revealed:

> [T]he documents to support and raise the issue of ineffective assistance of counsel were originally filed at this Court while the case was pending on direct review.

Id. at 146 (footnote omitted).

By order of the court of appeals, an evidentiary hearing, known in military justice as a *DuBay* hearing, was conducted almost nineteen years after sentencing.[2] Despite the death or degraded health of material affiants in the intervening years and the unavailability of affiants for live testimony when the evidentiary hearing finally occurred,[3] the military judge entered findings of fact and conclusions of law (App., *infra*, 79a-105a) pronouncing affidavits in the record to be unreliable and not credible. With the hindsight set in place by the military judge's conclusions, the appeals court denied Loving's habeas petition:

> Reweighing the aggravating evidence against the totality of mitigating evidence, we are convinced beyond a reasonable doubt that if the members had been able to place the additional evidence adduced during the

[2] Because there is no standing trial court in the military, the hearing was conducted by a military judge who did not preside at the original court-martial.

[3] In the context of the grant of a new trial to a habeas petitioner, this Court previously expressed concern that the *government* instead could be prejudiced by "the 'erosion of memory' and 'dispersion of witnesses' that occur with the passage of time." *Kuhlmann v. Wilson*, 477 U.S. 436, 453 (1986).

> habeas proceedings on the mitigating side of the scale, a reasonable probability that at least one member would have struck a different balance does not exist. We conclude that Loving has failed to meet his burden to establish prejudice under *Strickland* and deny the petition for extraordinary relief in the nature of a writ of habeas corpus.

Loving v. United States, 68 M.J. 1, 17-18 (C.A.A.F. 2009).

This petition concerns the prejudice to a servicemember due to the unreasonable delay in conducting an evidentiary hearing based on post-trial material that the court of appeals found to "raise[ ] substantial questions about the reasonableness of the investigation" upon which the court of appeals' decision on direct review, *United States v. Loving*, 41 M.J. 213 (C.A.A.F. 1994), was long-before grounded. *Loving*, 64 M.J. at 152. A historical overview of Loving's case now follows.

1. On January 31, February 9 and 21, March 6, 17, 23, 27-31, and April 1 and 3, 1989, Loving was tried at Fort Hood, Texas. He was found guilty of attempted murder, premeditated murder, felony murder, and four specifications of robbery, in violation of U.C.M.J. articles 80, 118, and 122, 10 U.S.C. §§ 880, 918, and 922, respectively. On April 3, 1989, the court-martial panel sentenced him to death, a dishonorable discharge, and forfeiture of all pay and allowances.

The Army Court of Criminal Appeals affirmed the findings and sentence on mandatory review, pursuant to U.C.M.J. article 66(b)(1), 10 U.S.C. § 866(b)(1).

United States v. Loving, 34 M.J. 956 (C.M.A.), *reconsideration denied*, 34 M.J. 1065 (A.C.M.R. 1992). The case then progressed to the United States Court of Appeals for the Armed Forces for its mandatory review, pursuant to U.C.M.J. article 67(a)(1), 10 U.S.C. § 867(a)(1). Loving asserted numerous errors, including ineffective assistance of counsel due to trial counsel's failure "to request funds for a mitigation specialist or to present a cohesive, comprehensible background, social, medical, and environmental history . . . ." *Loving*, 41 M.J. at 249.[4]

In support of Private Loving's claims, affidavits of Loving's family members (mother Lucille Williams, brother Ronald ("Ronnie") Loving, sister Gwendolyn ("Gwen") Black, sister Wendolyn ("Wendy") Black, and brother Harryl Loving), who all had been cooperative

[4] Because "neither the UCMJ nor the Manual for Courts-Martial, United States, 1984, provides procedures for collateral, post-conviction attacks on guilty verdicts," the Court of Appeals for the Armed Forces considers claims of ineffective assistance of counsel and will consider "not only the record of trial, but also . . . affidavits. . . ." *United States v. Murphy*, 50 M.J. 4, 5 (C.A.A.F. 1998). In appropriate cases, the court will also order an evidentiary hearing. *See, e.g., United States v. DuBay*, 17 U.S.C.M.A. 147, 37 C.M.R. 411 (1967); *United States v. Perez*, 18 U.S.C.M.A. 24, 39 C.M.R. 24 (1968). A *DuBay* hearing, as such hearings are known in the military courts, is appropriate when there are "conflicting affidavits" and "disputed questions of fact" that are "material" to resolution of the ineffective assistance of counsel claim. *United States v. Ginn*, 47 M.J. 236, 243, 245 (C.A.A.F. 1997). A hearing is required in these circumstances unless the appellant's factual allegations are "inherently incredible" or "compellingly" refuted by the record. *Id.* at 246.

prior to trial, and other records were filed with the court on March 1, 1993. In its response filed on May 5, 1993, the Government contested whether counsel was ineffective but did not challenge the credibility of the affidavits, except to say that the government did not concede the believability of this "newly discovered evidence." Brief of Respondent in *United States v. Loving*, C.A.A.F. No. 68,033, at 67. The Government did not submit any evidence on this issue other than affidavits of trial defense counsel. The Court denied relief without affording Loving a *DuBay* evidentiary hearing.[5] *United States v. Loving*, 41 M.J. 213 (C.A.A.F. 1994), *modified on reconsideration*, 42 M.J. 109 (C.A.A.F. 1995). This Court granted certiorari and, on June 3, 1996, affirmed. *Loving*, 517 U.S. at 751 ("The case before us concerns the authority of the President, in *our* system of separated powers, to prescribe aggravating factors that permit a court-martial to impose the death penalty upon a member of the Armed Forces convicted of murder.").[6]

[5] *See* note 4 *supra*. The U.S. Court of Appeals for the Armed Forces may refer a matter to a military judge to make further investigation, to take evidence, and to make such recommendations to the court as are deemed appropriate.

[6] Following this Court's affirmance, Loving filed a Petition for Extraordinary Relief in the Army Court of Criminal Appeals challenging the validity of an aggravating factor. The Army Court denied relief and the Court of Appeals granted review and affirmed. *Loving v. Hart*, 47 M.J. 438 (C.A.A.F. 1998). Loving also filed a Petition for Reconsideration out of time based on an intervening decision of the court of appeals. That petition was denied with Judge Effron dissenting. *Id.* (Effron, J., concurring in part and dissenting in part). This Court denied certiorari. *Loving v. Hart*, 525 U.S. 1040 (1998).

Since that time, Loving has remained in the military justice system in the stage after "there is a final judgment as to the legality of the proceedings" under U.C.M.J. Article 71(c)(1), 10 U.S.C. § 871(c)(1), but before the case is "final" under U.C.M.J. Article 76, 10 U.S.C. § 876. *Loving v. United States*, 62 M.J. 235, 236 (C.A.A.F. 2005). As the court of appeals explained:

> A capital case is final within the meaning of Article 76 only after the President, acting under Article 71(a), approves it. As finality under Article 76 is the terminal point for proceedings within the court martial and military justice system, this Court's jurisdiction continues until a case is final.

Id. at 240. Likewise, the court of appeals recognized that Article III courts are not likely to provide Loving any recourse until after his case becomes final under U.C.M.J. Article 76:

> Article III intervention presently is unlikely (in light of the application of doctrines of exhaustion or abstention) thereby rendering our continued involvement in this case as "necessary or appropriate" under the All Writs Act.

Id. at 249.

Remaining in limbo, Loving continued to seek review and relief in the court of appeals on his ineffective assistance of counsel claims. On January 2, 2001, Loving moved for leave to file a petition for reconsideration out

of time and moved for reconsideration, again requesting the court to examine the ineffective assistance of counsel claims, based on this Court's decision in *Williams v. Taylor*, 529 U.S. 362 (2000).[7] The court of appeals granted leave to file the motion for reconsideration out of time, but denied rehearing on March 30, 2001. *Loving v. United States*, 54 M.J. 459 (C.A.A.F. 2001).

2. On February 17, 2004, following this Court's decision in *Wiggins v. Smith*, 539 U.S. 510 (2003), Loving filed a Petition for Extraordinary Relief in the Nature of a Writ of Error Coram Nobis again seeking review of the ineffective assistance of counsel claim.[8] The evidence submitted before the court of appeals during mandatory review, including affidavits of family members, was included in the record filed with the court of appeals. Again, while the government argued in response that Loving was not denied effective assistance of counsel, the government submitted no evidence on this issue.

Following the court of appeals' dismissal of the writ with leave to refile as a habeas corpus petition, *Loving*, 62 M.J. at 236, Loving sought habeas relief, continuing to assert the ineffective assistance of counsel argument and again including the evidence that had been

[7] Loving asserted that, during the mandatory review, the court of appeals erroneously utilized the standard of *Lockhart v. Fretwell*, 506 U.S. 364 (1993) in analyzing the claims of ineffective assistance of counsel, rather than the appropriate test of *Strickland v. Washington*, 466 U.S. 668 (1984) for evaluating such a claim.

[8] Loving had earlier filed a petition seeking relief pursuant to *Ring v. Arizona*, 536 U.S. 584 (2002).

submitted during mandatory review. Yet again, the government submitted no contrary evidence and made only conclusory arguments that the evidence was a "one-sided presentation of the petitioner's upbringing [that] would have been easily debunked by the trial counsel and properly rejected by the panel." Reply Brief of the Respondent in *Loving v. United States*, C.A.A.F. No. 06-8006, at 33. During oral argument, in response to questions from the court, Loving's counsel asserted that he could not get a full and fair hearing because of the prejudice caused by the delay in granting him a hearing. Counsel specifically noted the death of Loving's mother and the unknown availability of other witnesses who had provided affidavits during the mandatory review. Despite notice of these concerns, the court of appeals ordered a *DuBay* hearing without analysis of the need for a presumption of evidentiary prejudice. *Loving*, 64 M.J. at 152.

In the 2006 opinion, the court of appeals determined that, in reviewing cases in Loving's status—i.e., those remaining in the period after there is a final judgment as to the legality of the proceedings under Article 71(c)(1), but before the case is "final" under Article 76—it would apply the standards under the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA") for federal court habeas review of state court decisions, 28 U.S.C. §§ 2244, 2254 (2006). Thus, the court determined that it would grant relief where its own prior decisions addressing constitutional issues:

> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or (2) resulted in a decision that was based on

> an unreasonable determination of the facts in light of the evidence presented in the State Court proceeding.

64 M.J. at 145 (quoting 28 U.S.C. § 2254(d)).

The court also considered whether AEDPA review would preclude an evidentiary hearing, under 28 U.S.C. § 2254(e)(2). In doing so, the court noted:

> This congressional direction as to when a habeas corpus applicant is not entitled to an evidentiary hearing is not applicable here. The condition precedent ("applicant has failed to develop the factual basis of a claim in State court proceedings") is not present in this case. Indeed, the documents to support and raise the issue of ineffective assistance of counsel were originally filed at this Court while the case was pending on direct review.

64 M.J. at 146 (footnote omitted). The court noted the character of these "voluminous documents and affidavits," *id.* at 134, and observed that Loving's evidence had gone "unrebutted," *id.* at 151, as "the Government ha[d] never sought to update its affidavits [submitted before the Army court] or rebut Petitioner's factual assertions relating to Petitioner's collateral challenge raising the issue of ineffective assistance of counsel arising from a deficient investigation," *id.* at 151 n.137.

The court then applied the factors in *United States v. Ginn*, 47 M.J. at 248, in determining that an

evidentiary hearing was appropriate. *Loving*, 64 M.J. at 152. In doing so, the court considered the adequacy of its own prior mandatory review of the issues under the AEDPA standards.

> In our initial consideration of the merits of this case on direct appeal this Court addressed defense counsel's investigation. Our opinion states "defense counsel conducted his own investigation," and we proceeded to explain how defense counsel made reasonable tactical decisions related to the sentencing proceeding (including the decision not to request funding for a mitigation specialist) . . .
>
> However, this holding does not adequately develop the factual predicate to support it. The facts in the opinion focus on the evidence offered in mitigation at trial. Our prior opinion did not adequately review the nature of defense counsel's investigation. Moreover, there was no discussion of the prevailing professional norms at the time as to what was a reasonable investigation or the "red flags" that should have alerted defense counsel to dig deeper to determine whether Petitioner was, indeed, the subject of specific childhood harm that might mitigate his culpability as alleged. The statement of legal conclusions and the absence of detailed factual analysis of what defense counsel did and did not do in investigating the case, reveals that our prior opinion did not address whether trial defense counsel "chose to abandon their investigation

> at an unreasonable juncture [thereby] making a fully informed decision with respect to sentencing strategy impossible."
>
> The recent authority of *Wiggins* reveals that this Court previously did not adequately focus on reasonableness of the defense investigation. This deficiency in our initial decision requires that we now address "whether the investigation supporting counsel's decision[s] . . . *was itself reasonable*."
>
> Moreover, in our initial consideration of the ineffective assistance of counsel claim on direct review, we did not order an evidentiary hearing regarding this issue. Therefore, Petitioner did not have an adequate opportunity on direct appeal to establish facts in an evidentiary hearing to support his ineffective assistance of counsel claim.

64 M.J. at 148 (footnotes and citations omitted).[9]

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[9] Loving's counsel had argued explicitly during mandatory review that "[c]learly, failure to fully investigate the background of appellant constitutes ineffective assistance of counsel." Brief of Appellant, in *United States v. Loving*, C.A.A.F. No. 68,033, at 87. After a lengthy discussion of the evidence available but not presented by trial defense counsel, Loving reiterated:

> *A reasonable investigation into Dwight Loving's background, drug and alcohol addiction, ability to be led, and level of intoxication at the time of the*

(Cont'd)

The court of appeals did not fault Loving for its own inadequate analysis during the mandatory review, however, and specifically recognized that Loving "did not have an adequate opportunity on direct appeal to establish facts in an evidentiary hearing to support his ineffective assistance of counsel claim." 64 M.J. at 148. Ultimately, because in 1993 Loving had produced "post-trial material which raise[d] substantial questions" warranting "an evidentiary hearing to establish the factual predicate for his claim," such a hearing was finally ordered by the court of appeals in 2006, *id.* at 152, and conducted in 2008.

(Cont'd)

> *offenses was not conducted by trial counsel.* They had been advised of the complexity of mitigation investigations and the skills required to competently perform a mitigation investigation, but they chose to ignore this information and proceed on their own. (Def. App. Exh. Y, affidavit of MAJ Hayden.) *The result was a grossly inadequate investigation and ineffectual penalty phase strategy and presentation of extenuation and mitigation evidence.* There is a reasonable probability that but for the counsel's decision to ignore the advice of individual's much more experienced than they, the disposition of this case would have been different.

Id. at 130-31.

HOW THE QUESTIONS PRESENTED WERE RAISED AND DECIDED BELOW

Prior to the presentation of witnesses in the *DuBay* hearing, held in February 2008, Loving's counsel asserted:

> And the concern is – I understand that this court can't fix the problem, but ultimately with CAAF, as we argued there before, with the passage of time, you know, witnesses, specifically Lucille Williams, is dead. Private Loving's siblings, some of them have continued to go downhill. But even if you had a very cooperative, functional, intelligent, whatever description you want to put it, the person, you're talking about 15 years after they signed the affidavits. So we just submit that at this point he is incapable of getting a full and fair hearing on evidence that should have and could have been presented in 1992, 1993 when he first submitted this evidence and asked for a hearing, and I would just put that on the record.

(C.A. App. 1058). The evidentiary prejudice to Loving was crystal clear prior to the court's *Strickland* inquiry and became even more apparent throughout the hearing.

The delay in conducting the *DuBay* hearing of 19 years after sentencing and 15 years after the evidence was submitted during mandatory review resulted in Loving's inability to present the testimony of his mother, Lucille Williams, who had testified during the court-martial and provided an affidavit during mandatory review, but who was deceased by the time of the *DuBay*

hearing. Loving was also unable to present the testimony of his brother, Ronnie Loving, who had testified during the court-martial and provided an affidavit during mandatory review, but dodged U.S. Marshals' attempts to secure his presence at the hearing. (C.A. App. 1279-80, 1421-22, 1546-49). The military judge ruled that he was unavailable. (C.A. App. 1684). Loving's sister, Gwen Black, who had cooperated with trial defense counsel prior to the court-martial and provided an affidavit during mandatory review, only appeared after the U.S. Marshals Service was sent to secure her presence. (C.A. App. 1279-80, 1421-22, 1425).

While Loving's counsel was prohibited from presenting evidence through cooperative family members about the reasons for Gwen Black's and Ronnie Loving's reluctance to testify (C.A. App. 1351), or problems the family members had developed subsequent to the court-martial (C.A. App. 1458, 1479-80), the problems with drug and alcohol abuse, as well as mental illness running throughout the family generally are well-established in the record. Even with respect to the family witnesses that did appear during the hearing, there were clear problems with their memories.

During the *DuBay* hearing, without prompting, Loving's oldest sister, Wendy Black, testified that she had difficulty remembering events in Loving's life. (C.A. App. 1346 ("It's been so long ago"); C.A. App. 1347 ("It's been so long, I can't tell you")). When asked about reading her affidavit prior to signing in late 1992, Ms. Black said, "I sort of did, it's been so long ago, I can't remember." (C.A. App. 1351; *see also* C.A. App. 1356

("I don't even remember signing it. . . . I didn't remember. It's been so long ago"); C.A. App. 1361 ("This was so long ago, but I don't think I would have signed it and not read it")).

Harryl Loving, Private Loving's brother, also noted difficulties remembering events in his own and Private Loving's childhood. When asked about his father's discipline, Harryl said, "[W]ell, because of the time – because there's been so much time in between since then and now, it's hard to remember. . . ." (C.A. App. 1364). When asked about fights between his parents, he again noted: "[I]t's really vague at this time." (C.A. App. 1366). When counsel specifically asked about memory impairments, Harryl disclosed that he has a long-standing diagnosis of "Traumatic Parkinsonism Syndrome" (C.A. App. 1366), which even resulted in his medical discharge from the military years before the *DuBay* hearing but well after Private Loving's mandatory review (C.A. App. 1376).

Loving's sister, Gwen Black, testified only after she was produced by the U.S. Marshals Service. (C.A. App. 1421-22, 1425). She also noted problems in remembering whether she read and signed her affidavit. She initially said that she only "vaguely" recalled signing it (C.A. App. 1426), and later said that she had no independent recollection of signing the affidavit (C.A. App. 1441). When asked if the affidavit was accurate, she said, "I don't recall some things, it was a long time ago, I was young at the time when I even said these things. I wonder if some of these things are true to myself right now." (C.A. App. 1426). She affirmed, however, that the affidavit was true to the best of her knowledge when

she signed it. (C.A. App. 1427; *see also* C.A. App. 1442 ("I'm not usually someone that would sign something without skimming over it.")). Black also had difficulties even remembering that she had met with trial counsel prior to trial until her memory was refreshed by reference to her affidavit: "Yes, I was pretty sure I did. I'm just–it's just so vague. It was so long ago." (C.A. App. 1440).

While Loving was provided with the assistance of a mitigation specialist during the *DuBay* proceedings, which he had not had during his court-martial due to counsel's failure to seek the necessary assistance, the value of her investigation and evaluation was also detrimentally impacted by the delay in granting the *DuBay* hearing. Specifically, based on the limited information available to her at that time, Janet Vogelsang, M.S.W., provided a report in 1993 during the mandatory review proceedings. During the *DuBay* proceedings in 2008, she attempted to complete her evaluation by thoroughly investigating Private Loving's background and history. She noted that she had also been unable to interview Gwen Black and Ronnie Loving, despite her attempts to do so. (C.A. App. 1460, 1536, 1541). She also noted other difficulties caused by the delay:

> I would like to have interviewed some teachers; even though I do have records from the schools I would have liked to talk to some teachers. Any other nonfamily members such as friends of the family, people who lived in that neighborhood, but as you know, an effort was made to locate others, but with the

> passage of time his mother has died, his father has died, his step-father has died, and there were just people that couldn't be located.

(C.A. App. 1460; *see also* C.A. App. 2113).

In closing arguments in the *DuBay* hearing, Private Loving's counsel addressed the problems that the absence of witnesses and faded memories caused in establishing prejudice under *Strickland* "19 years later."[10] (C.A. App. 1693). "[W]e saw with each of the witnesses coming in that memories fade. . . ." (C.A. App. 1694).

> [T]o the extent there is any failure in our evidence, I submit that it is because of the passage of time. It's something that Mr. Loving doesn't control and in particular, his mother is one of the affidavits that is before the court. She is now deceased.
>
> Ronnie Loving testified during the trial. He clearly was cooperative in 1993 and available. So, I would ask the court to consider those – those affidavits.

(C.A. App. 1694-95).

[10] Prejudice under *Strickland*, while related, is separate from prejudice under *Barker* and *Doggett* addressed herein. Under *Strickland*, a claim of ineffectiveness of counsel is subject to a two part test: the defendant must show that (1) counsel's performance was deficient and (2) the deficient performance prejudiced the defense. 466 U.S. at 687.

Even aside from the family member witnesses that were unavailable, it was clear, based on all of the witnesses who testified, that time had detrimentally affected all of the hearing witnesses' testimonies. Loving's trial defense counsel had difficulty remembering events in the case other than general recollections. As William Ibbotsen, lead counsel, stated early in his testimony: "I don't remember the details. This happened a long time ago. I don't remember the details." (C.A. App. 1069). Thereafter, Mr. Ibbotsen repeated the phrase "I don't remember" numerous times in his testimony, such that the phrase appears on virtually every page of the transcript of his testimony.[11]

Loving's other trial attorneys had similar problems. For example, much like Loving's siblings, Colonel Hayden expressed problems recalling details in his affidavits provided during mandatory review, although he acknowledged the accuracy of the affidavits to the best of his knowledge when they were signed.

> I agreed with what was in it. It's accurate to the best of my knowledge. I knew it was at the time when I signed it, but I probably don't remember most of the information that's in it right now.

(C.A. App. 1581). He also could not recall for certain whether he drafted the affidavits or whether they were drafted for him. *Id.*[12]

[11] *See, e.g.*, C.A. App. 1075; C.A. App. 1076; C.A. App. 1077; C.A. App. 1078; C.A. App. 1079; C.A. App. 1080; C.A. App. 1081.

[12] Another of the hearing witnesses, Mark Barshaw, one of Loving's military supervisors at the time of the crimes, did not even recall that he had testified during the court-martial. (C.A. App. 1292-93).

The military judge's "solution" for this problem was to find the prior affidavits of the family witnesses that testified to lack credibility and to completely discount them, even though the discrepancies between the hearing testimony and the affidavits were only minor and were caused by the passage of time.[13]

[13] Loving argued below that discounting the affidavits of the family members was erroneous for four reasons. First, each of these individuals acknowledged that they read their draft affidavits prior to signing in 1992 and that the information was true and correct as they knew it at the time. Second, specifically as it relates to Harryl Loving, he testified that he has been diagnosed with "Traumatic Parkinsonism Syndrome," which affects his memory. (C.A. App. 1366). Nonetheless, there was nothing in his testimony that was inconsistent with his affidavit. He simply could not remember all of the details of information he had provided previously. Third, as it relates to Gwen Black, who was a hostile witness having been escorted to the hearing by the United States Marshals Service, she could not "recall some things," but did not contradict anything in her prior affidavit other than her prior statement that she had dealt drugs when Loving was only eight years old and his older siblings had worked for her in the drug trade. (C.A. App. 521). Nonetheless, this portion of the affidavit cannot be viewed as incredible because Wendy Black testified that Gwen and her boyfriend had been dealing drugs and that at least Joe and Ronnie had been working for her. (C.A. App. 1339-40). This was also confirmed by Lucille Williams and Ronnie Loving in their affidavits. (C.A. App. 531, 585). Fourth, as it relates to Wendy Black, during her direct examination she noted that her affidavit was incorrect in that it cited her sister Sharon as dealing drugs and having her brothers work for her when it was actually Gwen, as addressed above. (C.A. App. 1343). She also noted inaccuracies in the affidavit with regard to what age she was when sexually abused and over what period of time.

With respect to Lucille Williams (deceased) and Ronnie Loving (whereabouts unknown), who were absent through no fault of Private Loving, the military judge essentially discredited their affidavits and did not consider them at all, except to the extent they corroborated their court-martial sentencing testimony and the *DuBay* hearing testimony of the other witnesses, whose memories had been ravaged by time, drugs and alcohol, and, in the case of Harryl Loving, a debilitating illness.

While essentially gutting Loving's evidence in this fashion, the military judge did not similarly discount trial defense counsel's prior affidavits, even when the affiants could not recall the details at the time of the hearing. (App., *infra*, 101a ("The Court finds that information contained in the affidavits of CPT Ibbotson, MAJ Hayden, and CPT Smart very credible and reliable")).

Despite Loving's briefing and oral argument asserting the gross unfairness of discounting the bulk of Loving's evidence,[14] the court of appeals found no

[14] Loving specifically argued in the brief:

> In essence rejecting any portion of this information, except the limited portions noted here, would penalize Loving for the delay in conducting the *DuBay* hearing when this Court already held that all of this information, which supported a hearing, was submitted by Loving while on direct appeal and that a hearing should have been granted then. *Loving*, 64 M.J. at 134, 148.

Petitioner's Brief Following DuBay Hearing, in *Loving v. United States*, C.A.A.F. No. 06-8006/AR, at 91.

error in the military judge's credibility determinations. Thus, while the court "reviewed the affidavits," the court based its finding and discussion only on the "live testimony and other documentary evidence" submitted during the *DuBay* hearing. 68 M.J. at 13 n. 10.

In his Petition for Reconsideration, Loving specifically asserted that he "has been denied due process of law required by the Fifth Amendment" because he "has been demonstrably prejudiced by the delay, due in no part to his own fault, in affording him a *DuBay* hearing on his claim of ineffective assistance of counsel." Petition for Reconsideration, in *Loving v. United States*, C.A.A.F No. 06-8006/AR, at 1 (footnote omitted). The court summarily denied reconsideration. (App., *infra*, 106a-107a).

REASONS FOR GRANTING THE PETITION

A. The Court of Appeals' Disregard of the Prejudice Created By a Lengthy Delay in Collecting and Weighing Evidence During Habeas Proceedings Violates the Due Process Clause of the United States Constitution.

This Court has long held that "the Fifth Amendment's prohibition against the deprivation of 'life, liberty, or property without due process of law'" is applicable in the Armed Forces. *Middendorf v. Henry*, 425 U.S. 25, 34 (1976). "But, in determining what process is due, courts 'must give particular deference to the determination of Congress, made under its authority to regulate the land and naval forces, U.S. Const., Art. I, §8.'" *Weiss v. United States*, 510 U.S. 163, 177 (1994) (quoting *Middendorf*, 425 U.S. at 43).

Congress has provided for mandatory review by the service Court of Criminal Appeals (composed of commissioned military officers) of all cases in which the accused was sentenced to death. U.C.M.J. Article 66(b), 10 U.S.C. § 866(b). In addition, Congress has provided for a second layer of mandatory review by the Court of Appeals for the Armed Forces (composed of civilian judges) of all cases in which a sentence of death was imposed. U.C.M.J. Article 67(a)(1), 10 U.S.C. § 867(a)(1). The accused is entitled to representation in both cases by detailed appellate counsel, regardless of indigence, and regardless of whether the accused chooses to retain civilian counsel. U.C.M.J. Article 70, 10 U.S.C. § 870. As recognized by the Court of Appeals for the Armed Forces, "[t]he appellate rights afforded to servicemembers is but one example where Congress has provided greater rights than found in the civilian sector." *Diaz v. Judge Advocate General of the Navy*, 59 M.J. 34, 38 n.5 (C.A.A.F. 2003) (citation omitted).

While there was no constitutional requirement that Congress provide for appeals of court-martial convictions and sentences, *cf. McKane v. Durston*, 153 U.S. 684 (1894), Congress clearly "created appellate courts as 'an integral part of the . . . system for finally adjudicating the guilt or innocence of a defendant.'" *Evitts v. Lucey*, 469 U.S. 387, 393 (1985) (quoting *Griffin v. Illinois*, 351 U.S. 12, 18 (1956)). Thus, "the procedures used in deciding appeals must comport with the demands of the Due Process . . . Clause[ ] of the Constitution." *Id.* at 393.

In other words, Congress created not one but two mandatory appeals in military capital cases. Because

Congress "opt[ed] to act in a field where its action has significant discretionary elements, it must nonetheless act in accord with the dictates of the Constitution – and, in particular, in accord with the Due Process Clause." *Id.* at 401. Likewise, the courts within the military system are bound by the dictates of the Constitution:

> Because the military court failed to follow "the principles of military law enacted by Congress," we hold that defendant's due process rights were violated in this case. There can be no question that the congressional standard and the authorized regulations clearly mandated at the time of defendant's sentence the results we set out here.

Dodson v. Zelez, 917 F.2d 1250, 1261 (10th Cir. 1990) (citation omitted).

Like the civilian system, in the military, the two-layered mandatory "direct appeal is the primary avenue for review of a conviction or sentence, and death penalty cases are no exception." *Barefoot v. Estelle*, 463 U.S. 880, 887 (1983). This is particularly true in the military where traditionally "collateral" claims, such as ineffective assistance of counsel or government misconduct, must be asserted during direct appeal. *Murphy*, 50 M.J. at 5. Thus, the need for due process protections is heightened in the military.

> [T]he protection afforded by procedural due process includes a "fair hearing" in accord with fundamental fairness. This protection means a prisoner must be accorded an "opportunity to be heard."

Panetti v. Quarterman, 551 U.S. 930, 949 (2007) (citations omitted). *See also Crane v. Kentucky*, 476 U.S. 683, 690 (1986) ("an essential component of procedural fairness is an opportunity to be heard"); *Gardner v. Florida*, 430 U.S. 349, 362 (1977) ("[P]etitioner was denied due process of law when the death sentence was imposed, at least in part, on the basis of information which he had no opportunity to deny or explain"); *Chambers v. Mississippi*, 410 U.S. 284, 302 (1973) ("[f]ew rights are more fundamental than that of an accused to present witnesses in his own defense").

Here, as addressed previously, in 1993 Loving presented the evidence on which the court of appeals subsequently relied in 2006 in remanding for a *DuBay* hearing that was ultimately conducted in 2008. Loving was denied due process and reliable factfinding proceedings due to the delay in granting the hearing, which was his "opportunity to be heard." Moreover, the responsibility for the delay belongs with the government and the court of appeals which already explicitly held that Loving "did not have an adequate opportunity on direct appeal to establish facts in an evidentiary hearing to support his ineffective assistance of counsel claim." *Loving*, 64 M.J. at 148.

Because of the failure to provide a hearing and, as a result, the failure to provide an adequate opportunity to be heard during the mandatory review process, through no fault of Loving, this issue must be considered as though the current action, although filed as an extraordinary writ, was part of Loving's mandatory appeal "as of right" under U.C.M.J. Article 67. Thus, this case must comport with heightened procedural due

process (applicable in the realm of appeals as of right), rather than the more limited due process protections in discretionary appeals and collateral proceedings. *See, e.g., Coleman v. Thompson*, 501 U.S. 722 (1991); *Murray v. Giarratano*, 492 U.S. 1 (1989); *Pennsylvania v. Finley*, 481 U.S. 551 (1987); *Ross v. Moffitt*, 417 U.S. 600 (1974).

While this Court has never determined whether procedural due process includes a right to a "speedy" appeal, similar to the right to "speedy trial," virtually all of the United States Circuit Courts of Appeals have held that due process includes a right to speedy appeal.[15] Indeed, the Court of Appeals for the Armed Forces has long held that inordinate delays in appellate proceedings "should not be tolerated,"[16] and has held explicitly that military appellants have a right to a timely review under the Due Process Clause of the Fifth Amendment, and under the statutory construct of U.C.M.J. Articles 66 and 67. *Diaz*, 59 M.J. at 37-38. The post-trial review "spans a continuum of process" from the time of sentencing to review by the court of appeals under Article 67. *Id.* at 37.

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[15] *See, e.g., United States v. Pratt*, 645 F.2d 89 (1st Cir. 1981); *Cody v. Henderson*, 936 F.2d 715 (2nd Cir. 1991); *Burkett v. Cunningham*, 826 F.2d 1208 (3rd Cir. 1987); *United States v. Johnson*, 732 F.2d 379, 381 (4th Cir. 1984); *Rheuark v. Shaw*, 628 F.2d 297 (5th Cir. 1980); *United States v. Smith*, 94 F.3d 204 (6th Cir. 1996); *United States v. Kimmons*, 917 F.2d 1011 (7th Cir. 1990); *United States v. Hawkins*, 78 F.3d 348 (8th Cir. 1996); *Coe v. Thurman*, 922 F.2d 528 (9th Cir. 1990); *Harris v. Champion*, 15 F.3d 1538 (10th Cir. 1994).

[16] *United States v. Tucker*, 9 U.S.C.M.A. 587, 589, 26 C.M.R. 367, 369 (1958); *see also United States v. Ervin*, 20 U.S.C.M.A. 97, 42 C.M.R. 289 (1970).

B. The Court of Appeals' Decision Cannot Be Reconciled With This Court's Precedents Governing the Presumption of Evidentiary Prejudice That Must Be Rebutted By the Government.

In order to determine whether appellate delay violates an appellant's due process rights, the courts of appeal have generally considered the balancing factors derived from *Barker v. Wingo*, 407 U.S. 514 (1972) in the speedy trial context. Those four factors are: "Length of delay, the reason for the delay, the defendant's assertion of his right, and prejudice to the defendant." *Id.* at 530.

"The length of the delay is to some extent a triggering mechanism," *id.*, because without excessive delay there is no reason for a court to consider the other factors. "Whether appellate delay satisfies the first criterion is best determined on a case-by-case basis," considering such factors as "length of the record and complexity of the issues." *Toohey v. United States*, 60 M.J. 100, 102, 103 (C.A.A.F. 2004).

> [W]e generally have to recognize that excessive delay presumptively compromises the reliability of a trial in ways that neither party can prove or, for that matter, identify. While such presumptive prejudice cannot alone carry a Sixth Amendment claim without regard to the other *Barker* criteria, it is part of the mix of relevant facts, and its importance increases with the length of delay.

Doggett v. United States, 505 U.S. 647, 655-56 (1992) (citation omitted) (no particularized showing of prejudice needed for eight and a half year delay due to Government's inexcusable oversights).

"Closely related to length of delay is the reason the government assigns to justify the delay." *Barker*, 407 U.S. at 531. *Doggett* states:

> Between diligent prosecution and bad-faith delay, official negligence in bringing an accused to trial occupies the middle ground. While not compelling relief in every case where bad-faith delay would make relief virtually automatic, neither is negligence automatically tolerable simply because the accused cannot demonstrate exactly how it has prejudiced him.

505 U.S. at 656-57. In balancing this factor, this Court declared:

> [T]he weight we assign to official negligence compounds over time as the presumption of evidentiary prejudice grows. Thus, our toleration of such negligence varies inversely with its protractedness, and its consequent threat to the fairness of the accused's trial.

Id. at 657 (citation omitted).

"[T]he defendant's assertion of or failure to assert his right to a speedy trial is one of the factors to be considered in an inquiry into the deprivation of the

right." *Barker*, 407 U.S. at 528. Failure to assert the right is not determinative of the issue, however. As the Court of Appeals for the Armed Forces described:

> We . . . recognize the paradox of requiring [the appellant] to complain about appellate delay either to his appellate counsel who sought multiple enlargements of time because of other case commitments or to the appellate court that granted the enlargements on a routine basis. While this factor weighs against [the appellant], the weight against him is slight given that the primary responsibility for speedy processing rests with the Government and those to whom he could complain were the ones responsible for the delay.

United States v. Moreno, 63 M.J. 129, 138 (C.A.A.F. 2006) (footnote omitted).

The fourth and final factor of prejudice to the defendant includes "the possibility that the defense will be impaired." *Barker*, 407 U.S. at 532. In particular,

> the inability of a defendant adequately to prepare his case skews the fairness of the entire system. If witnesses die or disappear during a delay, the prejudice is obvious. There is also prejudice if defense witnesses are unable to recall accurately events of the distant past. Loss of memory, however, is not always reflected in the record because what has been forgotten can rarely be shown.

Id.; *see also Dickey v. Florida*, 398 U.S. 30, 38 (1970) ("In addition to exerting every effort to require the State to try him, there is present in this record abundant evidence of actual prejudice to petitioner in the death of two potential witnesses, unavailability of another, and the loss of police records. This is sufficient to make a remand on that issue unnecessary."). Indeed, affirmative proof of particularized prejudice is not essential to every speedy trial claim. *Doggett*, 505 U.S. at 647.

Here, considering the factors set forth in *Barker* and applied by the Court of Appeals for the Armed Forces in the appellate context, *United States v. Toohey*, 63 M.J. 353 (C.A.A.F. 2006), Loving has established a denial of his due process right to speedy review:

(1) Length of the delay. Loving did not receive an evidentiary hearing and a substantive review by the Court of Appeals of the Armed Forces considering, as required by *Wiggins* and *Strickland*, "the nature of defense counsel's investigation," *Loving*, 64 M.J. at 148, until approximately 20 years after his sentencing and 16 years after his pleadings and evidence were submitted during the mandatory review proceedings.

While this Court "cannot definitely say how long is too long in a system where justice is supposed to be swift but deliberate," *Barker*, 407 U.S. at 521, the Court in *Doggett* found an eight and a half year delay to be excessive and prejudicial even without a particularized showing of prejudice. Likewise, the Court of Appeals for the Armed Forces has recognized, in general, that a delay of more than six years in completing the full and fair review of all issues asserted in appeals as of right

establishes a prima facie case of a constitutional violation. *See, e.g., United States v. Dearing*, 63 M.J. 478, 486 (C.A.A.F. 2006) ("The almost five years for a first-level appellate review by a service court of criminal appeals is facially unreasonable as it is clearly excessive and inordinate"); *Toohey*, 60 M.J. at 103 (almost six year delay in completing first appeal to service court "facially appear[ed] to be unreasonable" and established "prima facie case" where the government had "not attempted to defend the pace of Petitioner's appeal"). Clearly, the length of the delay in obtaining adequate review of Loving's constitutional claims of ineffective assistance has been excessive. This factor, thus, weighs in Loving's favor.

(2) Reasons for the delay. As addressed in detail previously, the delay in receiving an evidentiary hearing and an adequate review of Loving's ineffective assistance of counsel claim was caused quite simply by the failure of the court of appeals to adequately review the evidence and argument presented during mandatory review. *Loving*, 64 M.J. at 148.

While there may be a "more flexible review" for periods of delay caused by a court exercising its "judicial decision-making authority," *Dearing*, 63 M.J. at 486, the overwhelming bulk of the delay here was not due to the time required for deliberation. The delay was caused simply by the court's inadequate review in 1994, despite Loving's assertion of the issue and presentation of a prima facie case warranting relief or, at minimum, an evidentiary hearing. In addition, Loving continued to seek adequate review but was turned back time after

time in the court's denial of the petition filed in 2001, dismissal without prejudice of the petition filed in 2004, and delay in addressing the merits of the present petition filed in December 2006. In short, Loving "diligently and continuously asserted his rights . . . . [and] tenaciously hounded . . . [the] courts in pursuit of" adequate review of his claims. *Coe*, 922 F.2d at 532.

(3) The appellant's assertion of his right to a timely appeal. While the assertion of the right to a timely appeal is not alone determinative of the issue, *Barker*, 407 U.S. at 528, Loving has repeatedly asserted his right to an adequate review of his claim of ineffective assistance of counsel. He did so during the mandatory review proceedings, and in three separate petitions since that time. While Loving did not simultaneously assert a denial of timely review, he clearly was seeking review at every opportunity.

Moreover, it was not until Loving's counsel investigated and prepared for the *DuBay* hearing that the real prejudice was evident: unavailable witnesses, including those the social worker would have interviewed, and the ravages of time along with alcohol and drug use and debilitating illness of potential witnesses. Since that time, Loving asserted prior to and during the *DuBay* proceedings that he could not get a full and fair hearing. He also asserted in the briefing and oral argument before the court of appeals in the present proceedings that failure to consider the information in the affidavits presented would result in Loving being penalized for the delay caused through no fault of his own.

(4) Prejudice to the appellant. The prejudice to Loving in presenting his evidence and arguments in the *DuBay* hearing and before the court of appeals is clear. He established a prima facie case during the mandatory review proceedings. Nonetheless, the court did "not adequately develop the factual predicate to support" its conclusions and "did not address whether trial defense counsel 'chose to abandon their investigation at an unreasonable juncture [thereby] making a fully informed decision with respect to sentencing strategy impossible.'" *Loving*, 64 M.J. at 148-49. Likewise, the court "did not order an evidentiary hearing regarding this issue. Therefore, Petitioner did not have an adequate opportunity on direct appeal to establish facts in an evidentiary hearing to support his ineffective assistance of counsel claim." *Id.* at 148.

While the court of appeals attempted to rectify the failure to long-ago properly consider Loving's claim of ineffective assistance of counsel during sentencing by ordering a belated *DuBay* hearing, "mere access to the courthouse doors does not by itself assure a proper functioning of the adversary process." *Ake v. Oklahoma*, 470 U.S. 68, 77 (1985). Due to the delay, Loving was denied "a fair opportunity to present his defense." *Id.* at 76. In these circumstances, Loving was at least entitled to a presumption of evidentiary prejudice before any *Strickland* inquiry. Loving also has clearly established all of the problems foreseen by this Court in *Barker*: the death of witnesses, the disappearance of witnesses, and witnesses "unable to recall accurately events of the distant past." *Barker*, 407 U.S. at 532.

In this regard, this case is analogous to *Simmons v. Beyer*, 44 F.3d 1160 (3d Cir. 1995), in which the Third

Circuit found a habeas petition to be meritorious due to "an outrage[ous]" 13 year delay between sentencing and direct appeal, *id.* at 1169, and because the appellant was "undeniably prejudiced" by that delay in his ability to adequately present his *Batson* claim for appellate review, *id.* at 1170-71. The court held that the appellant "raised a colorable claim" and that "[t]he seriousness of this claim and its potential merit demand some form of habeas relief." *Id.* at 1168; *see also People v. McGlotten*, 166 P.3d 182, 187 (Colo. Ct. App. 2007) (lower court reversed due to five year delay in appeal of supplemental instructional issue where record was inadequate and could not reliably be reconstructed because "[t]he witnesses on remand were unable to recall the pertinent events with any degree of specificity or certainty, and there is no reason to think that still further efforts toward reconstruction would be productive"); *Lanier v. State*, 684 So. 2d 93, 100 (Miss. 1996) (capital case reversed based on instructional issue after seven and a half year delay on appeal due to court reporter fault in preparing adequate record).

Loving has been prejudiced in the same fashion by the intertwined problem caused by delay and the prejudice to his ability to establish his claim of ineffective assistance of counsel in that witnesses have died, become unavailable, or had their memories ravaged by time. Moreover, even without a specific showing of prejudice:

> In exceptionally egregious circumstances, a delay itself may "violate[] those 'fundamental conceptions of justice which lie at the base of our civil and political institutions' . . . and which define 'the community's sense of fair play and

> decency.' Once the time that constitutes the delay has elapsed no remedy can call it back."

Burkett, 826 F.2d at 1222 (alteration in original) (quoting *United States v. Lovasco*, 431 U.S. 783, 790 (1977)). The Court of Appeals for the Armed Forces has also specifically held that it will grant relief in egregious cases without a specific finding of prejudice. *Toohey*, 63 M.J. at 362 ("where there is no finding of *Barker* prejudice, we will find a due process violation only when, in balancing the other three factors, the delay is so egregious that tolerating it would adversely affect the public's perception of the fairness and integrity of the military justice system"); *see also Dearing*, 63 M.J. at 486 (reversed due to deficient self-defense instruction and almost five year delay from sentencing to Navy court's affirmance; no specific harm or prejudice shown for resentencing but sentence limited on remanded); *United States v. Harvey*, 64 M.J. 13 (C.A.A.F. 2006) (presence of convening authority in courtroom during closing arguments on findings, coupled with other circumstances, raised issue of unlawful command influence, and the military judge erred in not shifting burden on issue to the government; no specific harm or prejudice from delay in appeal shown for resentencing but sentence limited on remand). This case presents exceptionally egregious circumstances that warrant a presumption of evidentiary prejudice under this Court's precedents, and the court of appeals erred in not evaluating Loving's habeas petition from that perspective.

CONCLUSION

The prejudice suffered in the delay in gaining merits review of Loving's ineffective assistance of counsel claim has poisoned Loving's ability to prevail on that claim. The extent of that poisoning was not properly considered by either the military judge who conducted the *DuBay* evidentiary hearing or the court of appeals in ordering the hearing and reviewing the findings and conclusions. At the least, Loving's ineffective assistance of counsel claim should be measured anew in view of a presumption of evidentiary prejudice.

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE ARMED FORCES DECIDED JULY 17, 2009

UNITED STATES COURT OF APPEALS FOR THE ARMED FORCES

No. 06-8006/AR

Crim.App. No. 19891123

DWIGHT J. LOVING, Private, U.S. Army,

Petitioner,

v.

UNITED STATES,

Respondent.

Argued October 29, 2008

Decided July 17, 2009

ERDMANN, J., delivered the opinion of the court, in which EFFRON, C.J., and BAKER, J., joined. EFFRON, C.J., filed a separate concurring opinion. STUCKY, J., filed a separate opinion concurring in part and in the result. RYAN, J., filed a separate dissenting opinion.

Appendix A

Counsel

For Petitioner: *Teresa L.Norris*, Esq. (argued); *Lieutenant Colonel Mark Tellitocci* and *Captain William J. Stephens* (on brief).

For Respondent: *Captain Adam S. Kazin* (argued); *Colonel Denise R. Lind*, *Lieutenant Colonel Steven P. Haight*, and *Lieutenant Colonel Mark H. Sydenham* (on brief).

Amicus Curiae for Petitioner: *Michelle M. Lindo McCluer*, Esq., *Jonathan E. Tracy*, Esq., *Eugene R. Fidell*, Esq., and *Stephen A. Saltzburg*, Esq. (on brief) — for the National Institute of Military Justice.

Military Judges: Stephen V. Saynisch (trial) and Theodore E. Dixon (*DuBay* hearing)

OPINION

Judge ERDMANN delivered the opinion of the court.

Private Dwight J. Loving was convicted in 1989 of premeditated murder, felony murder, attempted murder, and several specifications of robbery. The court martial sentenced Loving to a dishonorable discharge, forfeiture of all pay and allowances, and to be put to death. The United States Army Court of Criminal Appeals affirmed the findings of guilty and the sentence. *United States v. Loving*, 34 M.J. 956, 970 (A.C.M.R.

1992). We affirmed on direct review in 1994. *United States v. Loving*, 41 M.J. 213, 300 (C.A.A.F.1994), *modified by* 42 M.J. 109 (C.A.A.F.1995). The Supreme Court affirmed that decision in 1996. *Loving v. United States*, 517 U.S. 748, 774 (1996).

The case is now before us on Loving's petition for extraordinary relief in the nature of a writ of habeas corpus alleging that defense counsel provided constitutionally ineffective representation in the sentencing phase of his trial. Assuming without deciding that the performance of Loving's defense counsel was deficient as alleged, we conclude that Loving has failed to demonstrate that there is a reasonable probability that, but for counsel's deficient performance, the result of the proceeding would have been different. We hold that Loving has failed to meet his burden to establish prejudice under *Strickland v. Washington*, 466 U.S. 668 (1984), and deny the petition for extraordinary relief in the nature of a writ of habeas corpus.

BACKGROUND

1. *Procedural Background*

When a court-martial sentence includes the death penalty, the case remains pending in the military justice system through five separate stages: (1) action by the convening authority under Article 60, Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 860 (2006); (2) review by the appropriate Court of Criminal Appeals under Article 66, UCMJ, 10 U.S.C. § 866, 10 U.S.C.

§ 866 (2006); (3) review by the United States Court of Appeals for the Armed Forces under Article 67(a)(1), UCMJ, 10 U.S.C. § 867(a)(1) (2006); review by the Supreme Court under Article 67a(a), UCMJ, 10 U.S.C. § 867a(a) (2006), if certiorari is sought and granted as provided in 28 U.S.C. § 1259 (2006); and (5) consideration by the President under Article 71(a), UCMJ, 10 U.S.C. § 871(a) (2006). A case does not become final under the UCMJ until completion of all five stages. *See* Article 76, UCMJ, 10 U.S.C. § 876 (2006).

In the present case, the United States Army Court of Criminal Appeals affirmed the findings of guilty and the sentence. *Loving*, 34 M.J. at 970. On direct review to this court, we also affirmed the findings of guilty and the sentence. *Loving*, 41 M.J. at 300. In doing so, we considered, inter alia, Loving's ineffective assistance of counsel claim under *Strickland*, which included allegations that his defense counsel "failed to request funds for a mitigation specialist or to present a cohesive, comprehensible background, social, medical, and environmental history" during the sentencing phase of Loving's trial. *Id.* at 249. We determined that this claim lacked merit, holding that defense counsel's investigation and presentation of mitigation evidence and their decisions regarding use of expert testimony at sentencing were reasonable. *Id.* at 250.

The Supreme Court issued its decision affirming the death sentence on June 3, 1996, completing stage four of the five stage process under the UCMJ. *Loving*, 517 U.S. at 774. In the thirteen years since the Supreme

Court's decision, the case has remained pending within the military justice system, awaiting presidential action.[1] Loving's case remains in a posture where his military remedies have not been exhausted—a critical component of any effort to obtain review in the Article III courts. *See Loving*, 62 M.J. at 248-51. As a result, review in the Article III courts is not reasonably available to Loving so long as his case remains pending in the military justice system. *See id.*

On February 18, 2004, prior to filing the present habeas petition, Loving sought relief from our court through a writ of coram nobis under the All Writs Act, 28 U.S.C. § 1651(a). *See id.* at 236. Among other allegations, relying on the intervening Supreme Court decision in *Wiggins v. Smith*, 539 U.S. 510 (2003), Loving argued that this court committed clear error during mandatory review of Loving's ineffective assistance of counsel in sentencing claim because the court did not focus on the investigative aspect leading to counsel's decisions. Loving alleged that defense counsel's investigation was not reasonable and that counsel's deficient conduct was prejudicial in sentencing.

In the course of considering his coram nobis petition, we addressed the jurisdictional issues presented by the status of his case—a case that remained pending in the military justice system after review by our court and

1. A more detailed appellate history is documented in prior opinions. *See Loving v. United States*, 64 M.J. 132, 134-36 (C.A.A.F.2006); *Loving v. United States*, 62 M.J. 235, 238-39 (C.A.A.F.2005); *Loving v. Hart*, 47 M.J. 438, 440 (C.A.A.F.1998).

the Supreme Court. *Loving*, 62 M.J. at 239-46. We specifically considered the implications of the relationship between cases pending in the military justice system and collateral review in the Article III courts. *Id.*

We concluded that a case pending final action under the UCMJ remained subject to extraordinary writ consideration by the appellate courts in the military justice system. *Id.* at 246. We further concluded that a writ of error coram nobis was not the proper vehicle for considering Appellant's claim because a writ of habeas corpus under the All Writs Act remained available. *Id.* at 257.

At that time, we could have converted Loving's coram nobis filings into a petition for habeas corpus, but we declined to make that decision for him. *Id.* at 259. Instead, "mindful that a habeas petition before this Court could affect Petitioner's right and strategy to raise . . . the issues . . . if eventually filed in an Article III court," we dismissed Appellant's petitions for extraordinary relief without prejudice for Loving to file a writ of habeas corpus in our court, citing *Noyd v. Bond*, 395 U.S. 683, 695 n. 7 (1969).[2] *Id.* at 256, 258-60. In so

2. In *Noyd*, Justice Harlan, writing for the majority, discussed the power of this court to issue a writ of habeas corpus under the All Writs Act:

> Since the All Writs Act [28 U.S.C. § 1651(a)] applies by its terms to any "courts established by

(Cont'd)

doing, we expressly alerted Loving to the potential effect of a habeas petition before our Court on future habeas petitions filed in the Article III courts. *Id.* at 258-60 (citing, inter alia, 28 U.S.C. § 2244).

While the case remained pending within the military justice system, Loving had a number of options, including filing a habeas petition in our court or awaiting action by the President before seeking judicial review. He elected to file a petition for writ of habeas corpus in our court. *Loving v. United States*, 64 M.J. 132, 134 (C.A.A.F.2006).

(Cont'd)

> Act of Congress," and since the Revisers of 1948 expressly noted that "the revised section extends the power to issue writs in aid of jurisdiction, to all courts established by Act of Congress, thus making explicit the right to exercise powers implied from the creation of such courts," we do not believe that there can be any doubt as to the power of the Court of Military Appeals [now the Court of Appeals for the Armed Forces] to issue an emergency writ of habeas corpus in cases, like the present one, which may ultimately be reviewed by that court. 395 U.S. at 695 n. 7, 89 S.Ct. 1876; *see also United States v. Denedo*, 2009 U.S. LEXIS 4160, at *14, 2009 WL 1576568, at *5 (June 8, 2009) (recognizing that when military appellate courts have subject-matter jurisdiction over the case or controversy, "military courts, like Article III tribunals, are empowered to issue extraordinary writs under the All Writs Act, *Noyd v. Bond*, 395 U.S. 683, 695, n. 7 (1969)").

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Loving filed his habeas petition with this court on February 2, 2006, raising essentially the same claim as to the trial defense team's constitutionally ineffective performance at sentencing that he raised in the previous coram nobis petition. *Loving*, 64 M.J. at 135. In the course of considering the habeas petition, we focused on what standard of review to apply to a habeas corpus action under the All Writs Act with respect to a case that remained pending in the military justice system. *Id.* at 144-46. Taking into account the importance of deference to decisions made during direct judicial review, and recognizing the limited scope of review under the All Writs Act, we adopted the highly deferential standard for collateral review used by other federal courts. *See id.* at 145-46. That restrictive standard requires us to determine:

> whether this Court's prior review: (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the [prior] proceeding.

Id. at 145 (citing 28 U.S.C. § 2254(d)) (alteration in original).

Applying that standard to the pending habeas petition, we observed in our prior decision that the factual record was inadequate. *Id.* at 150-52. Accordingly, we remanded for proceedings under *United States v.*

DuBay, 17 C.M.A. 147, 37 C.M.R. 411 (1967), which provides a well-established procedure for development of a post-trial evidentiary record, followed by return of the case to our court for further review. *Loving*, 64 M.J. at 152-53.

In particular, we determined that in light of *Wiggins*, "we [did] not have the factual predicate to determine if our prior decision addressing the issue of ineffective assistance of counsel was correct under the *Strickland* standard." *Id.* at 134. We ordered a *DuBay* hearing to address the issue of "whether Petitioner's trial defense counsel 'chose to abandon their investigation at an unreasonable juncture, making a fully informed decision with respect to sentencing strategy impossible' thereby prejudicing Petitioner in the capital sentencing phase of the court-martial." *Id.* (quoting *Wiggins*, 539 U.S. at 527-28). We directed the *DuBay* judge to issue findings of fact and conclusions of law on several specific matters related to counsel's investigation into Loving's background. *Id.* at 152-53. We also directed the *DuBay* judge to reweigh the evidence adduced at trial and in the *DuBay* proceeding to determine whether there was a reasonable probability that the panel would have returned a different sentence if the new evidence had been presented at trial. *Id.* at 153.

The *DuBay* hearing has been completed and the record has been returned to this court for further review. At the *DuBay* proceeding, the parties had full opportunity to present witnesses, documentary

evidence, and legal arguments. The military judge considered the evidence and arguments of the parties, applied the standard set forth in our prior opinion, and addressed the issues identified in our remand order. At the conclusion of the proceeding, the military judge issued a comprehensive decision detailing his factual findings and legal conclusions. In summary, the *DuBay* judge found that "a reasonable investigation as required by *Strickland*, as further explained in *Wiggins*, was conducted under the circumstances of this case. PVT Loving's defense counsel did not choose to abandon their investigation at an unreasonable juncture." The *DuBay* judge also concluded:

> [A]fter reweighing all of the evidence adduced at trial and considering the evidence presented in the *DuBay* hearing . . . had the panel been confronted with the evidence at issue, there is no reasonable probability that at least one member of the panel would have struck a different balance thereby not voting for a death sentence and the result of the sentencing proceeding would not have been different.

As a result of the standards and procedures adopted by our court, we now have before us a comprehensive record, developed by a military judge, which provides the precise framework necessary for effective and

accurate habeas review. The parties submitted additional briefs to this court and we held oral argument on October 29, 2008.[3]

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3. We ordered briefing on two issues:

> I. WHETHER THE RECORD OF THE EVIDENTIARY HEARING ORDERED PURSUANT TO *UNITED STATES V. DUBAY*, 17 C.M.A. 147, 37 C.M.R. 411 (1967), SHOULD BE RETURNED TO THE JUDGE ADVOCATE GENERAL OF THE ARMY FOR REMAND TO THE CONVENING AUTHORITY AND/OR THE ARMY COURT OF CRIMINAL APPEALS FOR REVIEW PRIOR TO REVIEW BY THIS COURT.
>
> II. WHETHER PETITIONER'S WRIT OF HABEAS CORPUS SHOULD ISSUE IN VIEW OF THE FINDINGS OF FACT AND CONCLUSIONS OF LAW ENTERED BY THE MILITARY JUDGE IN THE *DUBAY* PROCEEDING ON THE QUESTION OF WHETHER THE TRIAL DEFENSE TEAM CONDUCTED A REASONABLE INVESTIGATION INTO POTENTIAL EVIDENCE IN MITIGATION AND PROVIDED EFFECTIVE ASSISTANCE OF COUNSEL AT SENTENCING.

67 M.J. 22 (C.A.A.F.2008). As to the first issue, both parties and amicus curiae argued that it was appropriate for us to address the underlying issues at this time without remand to the convening authority or the Court of Criminal Appeals. We agree and turn directly to the second issue.

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2. *Factual Summary and Current Allegations*

On the night of December 11, 1988, Loving robbed two convenience stores at gunpoint. *Loving*, 41 M.J. at 229. He then robbed three cab drivers at gunpoint and killed two of the drivers after receiving money and other items. *Id.* He attempted to kill the third cab driver, but the victim struggled the gun away from Loving and fled the scene. *Id.* at 229-31. Loving was apprehended the next day and advised of his rights. *Id.* at 230. He waived his rights and confessed in a videotaped interview. *Id.*

Three military defense counsels were detailed to Loving's case: Captain William Ibbotson, Captain John Smart, and Major David Hayden. All three met with Loving shortly after his apprehension. On January 17, 1989, Hayden traveled to Loving's hometown of Rochester, New York, to conduct a background investigation. As to the details of the trip, the *DuBay* judge found as follows:

> [Major Hayden] spent all of 18 Jan 89 (the whole day, and into the evening) and part of 19 Jan 89, interviewing some family members, friends, and others (e.g., boxing coach, school teacher, Detective Verna[4]).

4. Detective Verna was an officer in the Rochester police department who had information about the rough neighborhoods in Rochester and problems with drugs and violence in the city.

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The purpose of the visit, according to MAJ Hayden, was "to find out information, as much information as I could about Dwight Loving's background." As suggested by CPT Ibbotson, he was also looking for evidence of impulsive behavior, as well as evidence of head trauma.

In Rochester, MAJ Hayden met with several of PVT Loving's family members including his mother, father, and some of PVT Loving's siblings. He learned more about PVT Loving's "upbringing" his "family structure" and his "relationship with his brothers and sisters."

MAJ Hayden learned "a lot" from his interview of Mr. Johnson, PVT Loving's childhood boxing coach....

. . . .

As further preparation for trial, CPT Ibbotson conducted additional background investigation by telephone of PVT Loving's history prior to his military service. He spoke with PVT Loving's mother, four brothers, and his sister Gwendolyn. He also spoke by telephone with Detective Verna. . . .

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> In addition to these investigative efforts, CPT Ibbotson and CPT Smart also interviewed unit witnesses, Ms. Pessina [Loving's girlfriend], friends of Ms. Pessina, and confinement officers supervising Private Loving in pretrial detention.

In the habeas petition before us, Loving alleges ineffective assistance of counsel in the investigation and presentation of mitigation evidence related to Loving's background and social history. Loving faults defense counsel for failing to obtain the assistance of a mitigation specialist or social worker. He also alleges deficiencies in the number of, approach to, and conduct of the background interviews that defense counsel conducted with Loving's family members and others, as well as deficiencies in the amount of social history records collected. Loving contends that the interviews were ineffective because defense counsel were looking for specific information in line with preconceived theories determined on the basis of their initial discussions with Loving and without the benefit of an open-ended investigation.

Loving also argues that during sentencing defense counsel only presented "skeletal information concerning Loving's background and environment that was wholly inadequate to present to the jury a true picture of his tortured life and the impact upon him." According to Loving, if "this true picture had been presented there is a reasonable probability that at least one juror would

have struck a different balance in the sentencing determination."[5]

INEFFECTIVE ASSISTANCE OF COUNSEL CLAIM

We consider claims of ineffective assistance of counsel under the two-prong test of *Strickland*. *See Strickland*, 466 U.S. at 687. First, Loving must show that counsel's performance was deficient. *Id.* "This requires showing that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." *Id.* Second, Loving must show that the deficient performance prejudiced the defense. *Id.* "This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable." *Id.* We need not analyze the *Strickland* prongs in any particular order. As the Supreme Court stated:

5. In his habeas petition filed February 2, 2006, Loving also alleged that defense counsel failed to adequately investigate and to present evidence in mitigation related to Loving's intoxication and mental state at the time of the offenses. This contention was largely based on affidavits from Gerlinde Joseph and Beverly Sedberry, acquaintances of Loving at the time of the murders. Both individuals testified at the *DuBay* hearing, and the *DuBay* judge determined that neither their affidavits nor their respective testimony were credible or reliable. As Loving has not pursued this line of argument following the *DuBay* hearing and we see no clear error in the military judge's credibility rulings, we focus on the alleged deficiencies related to his family and social background.

> [A] court need not determine whether counsel's performance was deficient before examining the prejudice suffered by the defense as a result of the alleged deficiencies. The object of an ineffectiveness claim is not to grade counsel's performance. If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, which we expect will often be so, that course should be followed.

Id. at 697; *see, e.g.*, *United States v. Quick*, 59 M.J. 383, 386 (C.A.A.F.2004). Here we will assume without deciding that the performance of Loving's defense counsel was deficient as alleged for purposes of analyzing the prejudice prong of *Strickland*.

To establish prejudice under *Strickland*, Loving must show that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Strickland*, 466 U.S. at 694. In the context of this capital case challenging the death sentence, "we reweigh the evidence in aggravation against the totality of available mitigating evidence." *Wiggins*, 539 U.S. at 534. The question is whether if the members had been able to place the additional evidence "on the mitigating side of the scale, there is a reasonable probability that at least one [member] would have struck a different balance." *Id.* at 537.

In this case, we undertake this prejudice review de novo. Under the standards of 28 U.S.C. § 2254(d), a habeas review of a constitutional claim would normally employ a deferential review of the challenged decision. *See Bell v. Cone*, 535 U.S. 685, 698-99 (2002). However, we did not reach the prejudice prong of *Strickland* in our 1994 direct review of this case. *See Loving*, 41 M.J. at 250. Consequently, our review is not circumscribed by any previous conclusions of this court. *See Wiggins*, 539 U.S. at 534. Nor is our review impacted by the *DuBay* judge's conclusion on prejudice, which we also review de novo. *See United States v. Davis*, 60 M.J. 469, 473 (C.A.A.F.2005).

We have carefully reviewed the totality of the evidence—both that adduced at trial and the evidence adduced in the *DuBay* proceeding. After reweighing the evidence in aggravation against the totality of available mitigating evidence, we conclude that Loving has failed to meet his burden to show a reasonable probability that at least one member would have struck a different balance. Accordingly, we deny the writ under the second prong of *Strickland* without "grad[ing] counsel's performance" under the first prong. *Strickland*, 466 U.S. at 697.

Our analysis will commence with a summary of the aggravation and mitigation evidence presented at trial. We will then review the mitigation evidence presented at the *DuBay* hearing and "reweigh the evidence in aggravation against the totality of available mitigation evidence." *Wiggins*, 539 U.S. at 534.

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1. *Aggravation Evidence Presented at Trial*

We adopt the detailed description of the crimes from our direct review in 1994. *See Loving*, 41 M.J. at 229-31. After robbing two convenience stores at gunpoint, Loving got into a taxicab driven by Christopher Fay, an active duty soldier working as a cab driver for extra money.

> [Loving] directed Fay to a secluded area on Fort Hood and, at gunpoint, demanded all his money. After receiving an unknown amount of money from Fay, [Loving] shot him in the back of the head. While watching the blood "gushing out" of the back of Fay's head, [Loving] shot him in the back of the head a second time. Fay died as a result of the gunshots. His body was discovered by another soldier at Fort Hood about 30 minutes later.
>
> [Loving] fled from the cab to his barracks room, counted the money, and called for a second cab at about 8:15 p.m. The driver of the second cab was Bobby Sharbino, a retired Army sergeant. [Loving] directed Sharbino to a secluded street in Killeen and, at gunpoint, took his money pouch, wallet, and a green BIC cigarette lighter. He ordered Sharbino to lie down on the seat and shot him in the head, killing him.

Id. at 229.

Afterwards, Loving went to his girlfriend's home. A short time later, he and his girlfriend went to a club with friends.

> [There, Loving] became involved in an altercation with another male patron because the patron was staring at [his girlfriend]. During the altercation, [Loving] drew his pistol and invited the patron to go outside. As the patron advanced toward [Loving], [Loving] backed up, stumbled over a chair, and dropped his pistol on the ground, causing it to discharge.

Id. Loving and his girlfriend left the club and took a cab, driven by Howard Douglas Harrison. Loving's girlfriend was dropped off near her home.

> After pulling a gun, [Loving] directed Harrison to a secluded street, demanded money, and took Harrison's wallet and coin changer, obtaining about $94.00. [Loving] jerked Harrison's head around and told him to open his mouth. Believing that he was about to be killed, Harrison grabbed the pistol. During the ensuing struggle, Harrison gained possession of the pistol after it went off. Then he attempted to shoot appellant, but the pistol would not fire. Harrison fled the scene, with [Loving] chasing him. After Harrison hit him, [Loving] ran to [his girlfriend's] house, having regained possession of the pistol.

Id. at 229-30.

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During the sentencing phase of the trial, the Government presented evidence showing that Loving had previously been subject to nonjudicial punishment under Article 15, UCMJ, 10 U.S.C. § 815 (2006), and that he had received counseling related to poor duty performance on prior occasions.

The Government also presented evidence to show that Loving lacked remorse for his recent crimes. Private Forrest Kevin Brown, who was in pretrial confinement with Loving, testified that Loving told him that "he did the first – did it the first time to see if he could get away with it, and then he did it because it was fun, and then he said something along the lines, 'Because love makes you do crazy things.' " Brown also testified that he heard Loving say, "if he had to do it over, the only difference is he wouldn't get caught." After Brown testified, the parties presented testimony from prison personnel as to whether Brown would have had occasion to speak alone with Loving. Defense counsel argued that Brown was not credible and that other evidence shows that Loving had shown remorse.

The military judge instructed the members that a death sentence may not be adjudged unless all the court members find beyond a reasonable doubt that one or more of the following aggravated circumstances existed:

> [1] the premeditated murder of Bobby Gene Sharbino was committed while the accused was engaged in the commission or the attempted commission of a robbery;

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> [2] having been found guilty of the felony murder of Christopher Fay ... the accused was the actual perpetrator of the killing;
>
> [3] having been found guilty of premeditated murder of Bobby Gene Sharbino, the accused was also found guilty of another violation of Article 118, [UCMJ], in the same case, and that's referring to the murder of Christopher Fay.

See Rule for Courts-Martial (R.C.M.) 1004(c). The members unanimously found beyond a reasonable doubt that all three of these aggravating factors were proven.

The military judge also instructed the members that seven additional aggravating circumstances may be considered:

> [1] the Article 15's received by the accused;
>
> [2] the testimony of Captain Bush that the accused is of average intelligence and has been counseled on occasions in an effort to make him a satisfactory duty performer and, in his opinion, has no rehabilitative potential;
>
> [3] the nature of the weapon used in the commission of the offenses and the fact that the accused fired the weapon during the course of each offense;

> [4] the fact that the accused killed his victims after they had fully cooperated with him and had given him their money;
>
> [5] the nature and extent of the injuries suffered by the victims;
>
> [6] the accused's lack of any remorse;[6] [and] . . . .
>
> [7] the testimony of Private Brown that the accused told Private Brown that the first killing was to see if he could get away with it and, after that, it was for fun.

2. *Mitigation Evidence Presented at Trial*

This is not a case where the record of trial was devoid of mitigation evidence at sentencing. The military judge instructed the members that they must consider the following nineteen circumstances in extenuation and mitigation:

> [1] The accused's age;
>
> [2] The accused grew up in a low income urban area in Rochester, New York;

6. The military judge instructed the members that whether the evidence established remorse or lack of remorse was for them to decide.

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[3] The accused grew up in a single parent household with seven other children;

[4] Mr. Loving, Sr., the accused's father, and his [e]ffect on the accused;

[5] The accused was a nonregent student in a troubled school system who did not finish high school;

[6] The accused was exposed to violence during his youth;

[7] The accused favorably responded to positive leadership at several points in his life;

[8] The accused has difficulty expressing and showing emotion;

[9] Drug involvement in any of these offenses that was demonstrated though the evidence, if any;

[10] During his early youth, the accused was a follower;

[11] The accused's boxing experiences;

[12] The accused's good duty performance under the guidance of strong leadership;

> [13] The accused has exhibited remorse for these offenses . . . ;[7]
>
> [14] The offenses were committed over a relatively short period of time;
>
> [15] The accused's motives for these offenses;
>
> [16] The accused's . . . adaptation to confinement; and,
>
> [17] The accused is precluded from pleading guilty to capital offenses by the [UCMJ] . . . ;
>
> [18] [T]he duration of the accused's pretrial confinement, which began on 13 December 1988;
>
> [19] The accused's entitlements to wear certain medals and awards. . . .

One of the mitigating factors emphasized by the defense was Loving's motivation at the time he committed the offenses, which defense counsel attributed to his girlfriend's influence over Loving. However, evidence of Loving's family and social

7. The military judge again instructed the members that they would have to resolve the question of whether the evidence shows remorse or lack of remorse for themselves. *See supra* n. 6.

background was also prominent in the mitigation case. Defense counsel introduced the idea that Loving's background would be an issue in mitigation during his opening argument in findings, stating as follows:

> From an inter-city [sic] neighborhood, in Rochester, New York; a large, Northeastern city—a larger, Northeastern city. The youngest of eight children. A father—an alcoholic, with a rapsheet about four pages long. You'll see this information about the kind of upbringing he had; the kind—the lack of a strong, parental figure he had—the need he had for that. The need he had for acceptance. . . .

During closing argument on findings, defense counsel stated:

> You've learned a little bit about him from his squad leader, Sergeant Key. You know where he's from. A city in the northeast. You know a little bit about his family and his background. You know what sort of person he was. As— when he was in the military you can pick up on some of the things you've heard already. He was a soldier who wasn't socialized very well when he came in. He wasn't mature and he wasn't educated and he didn't have the kind of background that would allow him to do well in the military and this cost him. . . . Now that tells you something that he didn't have, when he came in the Army; a certain

> lack of background and training and how to deal with life. Go on down the road to that summer and fall of 1988 when he met Nadia Pessina.

During the sentencing phase, defense counsel presented the testimony of a number of witnesses to address Loving's family and social background. These included: Joe Loving Sr., Loving's father; Lucille Williams, Loving's mother; Ronald Loving, Loving's brother; Wendolyn Black, Loving's sister; Lord Johnson, Loving's childhood boxing coach; and Detective Verna of the Rochester police department. Stipulated testimony was submitted from Harryl Loving, Loving's brother, and Kenneth Wilson, Loving's childhood teacher. The arrest records of Loving's father, the arrest record of a childhood friend, and Loving's school records were also admitted into evidence.[8]

The mitigation evidence showed that Loving was the youngest of Lucille Williams's eight children and his early years were spent in a violent neighborhood in a dangerous section of Rochester, New York. As to Loving's home life, there was evidence that Loving's father was a heavy drinker, who would come in and out of his children's lives. Loving's father was physically abusive towards Loving's mother, which regularly resulted in police intervention and medical attention.

8. In support of other mitigating factors, defense presented testimony from two prison guards, a prison counselor, and his first line supervisor.

Ms. Williams told her children not to get involved in the fights unless they saw him killing her. Loving's oldest sibling, Wendolyn, acknowledged one incident where she had to "try to pull him off" her mother.

Ms. Williams worked nights at Rochester Psychiatric Center and suffered from narcolepsy, a sleeping disorder that eventually required her to quit work. Wendolyn testified that she cooked and cleaned and babysat to help out around the house. According to Wendolyn, her mother kept a clean house. As to discipline, Wendolyn indicated that she and her siblings respected their mother and were disciplined only when they needed it. Wendolyn stated, "She'd beat us . . . she might whip us with the belt or . . . hit at us with her hand." Joe Loving Sr., testified that he "spanked [the children] when they did something real bad . . . . to make them cry . . . it would hurt a little bit, but I wouldn't just beat 'em up."

Lord Johnson, who coached Loving and his brothers in boxing and knew the family over many years, testified that Ms. Williams was a single mother on welfare. He agreed that she was "a good woman" and indicated that the children had food and clothes and were "always clean when you see them." He stated that the children had some parental guidance in the home but "needed a little bit more."

The testimony of Loving's mother, his brother Harryl, his brother Ronald, and Lord Johnson shows that of all his siblings, Loving was closest to Ronald,

who was five years older than Loving. Harryl testified that when Loving was with Ronald, "they were involved in getting high and playing basketball." According to Loving's mother, Ronald "turned to the streets," got into trouble, and spent some time in jail. Harryl described Ronald as a "street fighter" and "a very active thief [who] had attacked a number of people." When asked what it was like "being a kid in Rochester," Ronald testified that it was "[a] jungle . . . You've got to survive." He elaborated:

> It was just—you had the Puerto Ricans and you had the blacks and you had the whites and Jamaicans. A lot of prejudice, you know, a lot of gangs. It was just rough. You had to wake up thinking like, you know, you had to fight sometimes to go to the store. We had family fights with people living next door to us. . . .

He said: "[Y]ou either fight or you move—move meaning out of Rochester." When asked why such a choice existed, Ronald stated: "Well, it's scary. They take you—they take you out—they'll kill you. If they don't kill you, they'll wound you real bad." Ronald said that he "fought every day." He had been "stabbed," "busted up side the head," "jumped," "hit by a car," "shot at," "cut," and "tricked."

Several other witnesses addressed problems of drugs and gang violence that the Loving children were exposed to as they grew up in Rochester. Detective

Verna stated that there are four "very, very rough neighborhoods" in Rochester and that a great number of assaults occur in the Rochester schools, which many people consider "armed camps." He testified that the drug problem in Rochester is "pervasive." According to Loving's mother, "they're fighting, they're drinking, they're stealing, they're doing everything." Harryl testified that "[t]here are neighborhoods where the violence is high, where the street gangs roam and where you can get into trouble, even if you're not looking for it." Harryl testified that his sister's house was burned down by gang members and that his brother Darryl was jumped by gang members. Lord Johnson also discussed gangs in the Rochester neighborhoods, reiterating that Loving's brother was beaten up by a gang, and indicating that a close friend of Loving's from the boxing program who joined a gang was incarcerated for "tr[ying] to kill someone."

Other testimony from these family and background witnesses established that Loving lived in two different neighborhoods when he was growing up. The second was much cleaner and safer than the first. According to Harryl, "Oakbend was the worst. The house on Stunz was better. It was cleaner and had better neighbors. There were not as many fights, drug sellers, or criminal acts as there were on Oakbend Street." Harryl, who was two years older than Loving, testified that the family moved to the better neighborhood when Harryl was in about eighth grade in 1979. Harryl claimed that the second neighborhood was "relatively drug free when we were growing." Harryl stated that he "stayed in the new

neighborhood, but his brothers Ronald and Joe Junior used to go back to their friends in the old neighborhood."

The stipulated testimony of Kenneth Wilson, Loving's school teacher, described Loving as moody and tempermental—"feverish"—which he said was typical of students who had a history of poor performance in academics and lived in the inner city. He testified that Loving appeared distracted and had to be closely monitored. He was transferred to a special school for students having problems with their regular high school. Ms. Williams stated that Loving never graduated. Loving's father was not aware that he had transferred schools and believed that he "graduated every year." School records showed that Loving was frequently absent from school and that he was suspended for fighting at school and for possession of a knife on school premises. According to Mr. Wilson, Loving's parents never came to high school to ask about progress or problems.

For about thirteen years prior to trial, Ms. Williams's current husband, Mr. Williams, lived in her home. Ms. Williams testified that Mr. Williams "always done well by all of [the children], but they . . . resent him saying what he wanted to say." Ronald Loving testified that he hated Mr. Williams. He described him as the "worstest [sic] man I've ever met in my life, and I've met some bad people."

The mitigation evidence related to Loving's background predominantly focused on the difficulties Loving and his siblings faced in childhood. Some testimony from Lord Johnson, however, was positive. Mr. Johnson talked favorably about the facility where he ran the boxing

program, the sense of direction that the boxing program offers the children, and Loving's success at boxing. He spoke about the "beautiful relationship" that he had with Loving while Loving was training and competing in the boxing program. During closing on sentencing, defense counsel argued that this evidence showed that Loving could respond to positive leadership in his life and that he did "attempt to rise above his situation there and he did achieve some measure of success. But it may be a case of too little, too late in his development."

Defense counsel spent a fair portion of his closing argument calling the members' attention to Loving's troubled background. He urged the members to consider the "surroundings under which he grew up, especially from the ages of zero to ten, when he was on Oak Lawn—or, Oakland,[9] in that area, that's been torn down, that's being redone because what was there was not acceptable." He urged the members to "[c]onsider what [e]ffect that had in shaping his development as he was growing up, forming his values, deciding how he makes judgements." Defense counsel argued that Loving grew up in "environment filled with violence," in an "urban, northeastern city, sometimes on the streets" in a broken home with "no real father to speak of." Defense counsel reminded the members of Loving's brothers' testimony as to the violence they saw in their youth and the family's interaction with gangs.

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9. Defense counsel was referring to one of the first streets the Loving family lived on in Rochester, which was identified as either "Oakbend" or "Oakman" during the trial and the *DuBay* hearing.

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Defence counsel also mentioned Loving's mother's illness and how as the youngest of eight children Loving received less of the guidance, love and care that was necessary. He argued that Loving's siblings were not good role models, pointing to his brother Darryl, who had been attacked by a gang, and his brother Ronald, "the survivalist." Defense counsel also discussed how the school environment failed to provide Loving with "the socialization skills for getting along with people later in life" and argued that Loving's parents were not there to guide him through school when the system failed him.

Defense counsel urged the members to decide against the death penalty because of Loving's "values, his judgement, and his maturity or, more accurately, his immaturity." Defense counsel argued:

> You know where he learned these things, he learned his values, you know he learned them from. He didn't have a strong brother, he didn't have a strong father, a mother with the time to provide him what he needed. His teachers didn't help. . . . His background makes him less able to handle situations like he did back on the 11 and 12 December. Like they say, you can take the man off the streets, but can't necessarily take the street . . . out of the man.

Acknowledging that Loving grew up in the inner city where there are gangs, drugs, and violence, that Loving's brother participated in some of that violence,

and that Loving's father beat his mother, trial counsel responded that there was little testimony as to what the real effect of this was on Loving himself. He pointed out that Ms. Williams was a good woman who did everything she could, that his parents did not teach Loving that it was alright to commit crimes, that while his mother took a belt to the children when the kids deserved it, they were not abused children. He noted that Loving himself was not a street fighter like his brother Ronald and that Loving had opportunities through a special school and through the boxing program, both of which he gave up on.

Of the nineteen mitigating circumstances that the military judge instructed the members they must consider, at least six related to the hardships from Loving's background and environment, including: the "accused grew up in a low income urban area in Rochester, New York;" the "accused grew up in a single parent household with seven other children;" "Mr. Loving, Sr., the accused's father, and his [e]ffect on the accused;" the "accused was a nonrepent student in a troubled school system who did not finish high school;" the "accused was exposed to violence during his youth;" and "[d]uring his early youth, the accused was a follower."

3. *Mitigating Evidence at the DuBay Hearing*

In this case, the crux of our prejudice inquiry under *Strickland* is whether there is a reasonable probability that the mitigating evidence introduced at the *DuBay*

hearing would have produced a different result had it been introduced at trial. *See Wiggins*, 539 U.S. at 537-38; *see also Rompilla v. Beard*, 545 U.S. 374, 393 (2005). At the *DuBay* hearing, four witnesses provided testimony about Loving's background: his sisters Wendolyn and Gwendolyn Black, his brother Harryl Loving, and his aunt, Alline Anderson. Wendolyn Black and Harryl Loving had testified at trial; the other two had not. The defense also presented the testimony of Ms. Janet Vogelsang, a social worker, along with Ms. Vogelsang's written biopsychosocial assessment of Loving. The defense also submitted records from the New York State Department of Social Services documenting some of the services, assistance, and home visits provided to the family from 1967 to 1985, as well as some medical records related to Loving's birth and pediatric care.[10]

10 We have also reviewed the testimony of the other witnesses who testified at the *DuBay* hearing, including the three trial defense counsel, a forensic psychiatrist who consulted with trial defense counsel, various capital litigation experts, an expert in psychopharmacology, acquaintances of Loving who were with him on the night of the murders, and a fellow servicemember. The testimony of these witnesses pertains to allegations of counsel's deficient performance under the first prong of *Strickland* or to counsel's alleged failure to present evidence in mitigation related to Loving's intoxication and mental state at the time of the offenses. As our analysis of the prejudice prong of *Strickland* focuses on the mitigation evidence related to Loving's family and social background, we do not recount this other testimony in detail here. *See* supra pp. 12-13 and n. 5. Similarly, we reviewed but do not recount in

(Cont'd)

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The testimony of all four family members addressed Loving's father's drinking problem and his physical

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detail other documentary evidence presented at the *DuBay* hearing including but not limited to submissions regarding the standards of practice for capital defense attorneys, trial defense counsel's notes, Loving's possible drug use around the time of the murders, and medical records of Loving's brothers, which were generated in February 1989, November and December 1991, and August and September 1992.

In addition, affidavits from Gwendolyn and Wendolyn Black, Ronald and Harryl Loving, and Lucille Williams, which were signed in 1993, were submitted as part of the habeas proceedings. These affidavits had previously been filed with this court and we instructed the *DuBay* judge to evaluate the credibility and reliability of the factual information contained in the affidavits. *Loving*, 64 M.J. at 152. Noting that the affidavits of Harryl Loving, Wendolyn Black, and Gwendolyn Black "were drafted by an unknown third party and presented to each individual for signature, not read (or not read thoroughly) by the individual prior to signing, and contained inaccurate or false information," the *DuBay* judge found the information in these three affidavits was not reliable. As to the affidavits of Lucille Williams and Ronald Loving, who did not testify at the *DuBay* hearing, the *DuBay* judge indicated that he was not able to judge their credibility and found that the information contained in those two affidavits was credible to the extent that it was consistent with their testimony at trial or otherwise corroborated by the testimony of the *DuBay* witnesses. We review the *DuBay* judge's credibility determinations for clear error and find none. *See United States v. Bromfield*, 52 M.J. 40, 44 (C.A.A.F. 1999). As such, while we have reviewed the affidavits, we find it appropriate to focus our discussion on the background information provided through live testimony and other documentary evidence.

abuse toward their mother. A few specific incidents were described, including one where Wendolyn hit Joe Loving Sr., with a hammer to protect her mother and another where Joe Loving Sr., beat Lucille Williams "so bad he stripped her, just tore everything off, and left her in the street." The testimony also gave specifics as to violence between the Loving family and their neighbors on Oakbend Street. Wendolyn testified that her family would get into fist-fights with the neighbors and her uncle once brought out a gun. Gwendolyn testified that she was hit in the head with a bat and her brother Joe was hit with a bed rail. She recalled hearing about an incident when "molly [sic] cocktails" were thrown through the windows of the family home. Ms. Anderson described a night when bullets started coming through the windows and they all had to duck to the floor.

Gang violence was also addressed in the *DuBay* testimony. Wendolyn believed that Loving was staying with his sister at the time her house was burned down by a gang and Gwendolyn believed the act was in retaliation for Loving's "beating them up." Wendolyn recalled that Loving was having problems with gangs, who "jumped on his friend." She also testified that a gang "jumped on [her brother Darryl] and beat him senseless."

Loving's siblings addressed questions as to whether the children suffered any physical harm from the disciplinary actions of their parents or siblings while growing up. Harryl and Gwendolyn indicated that Joe Loving Sr., would use a leather belt to whip the boys'

bare skin. When asked what prompted such punishment, Harryl stated that "it's hard to remember a lot of the bad things that we did as kids." Harryl remembered one incident when his mother spanked the children with a stitching cord after they skipped school and went to a shopping center where they started stealing. Gwendolyn testified her mother would discipline them with a belt, switch or extension cord.

Wendolyn testified that while her mother was working nights, she and her sister Gwendolyn would take care of the younger children. There were instances when Wendolyn would hit the other children, "knock 'em up side the head or something" with her hand. Gwendolyn testified that she and Wendolyn would teach the boys to fight each other and if they did not want to fight, they would hit them to get them to fight. Harryl denied any recollection of Wendolyn abusing him. At one point, Harryl described his sibling relationship as follows: "when we were real young, we all hung together. We played together. We played kickball. We played football. We played basketball. We played baseball. We played volleyball. We played dodge ball. . . . [W]hen we were on Oakman Street, we all played together."

Each of the three siblings testified as to the drinking and drug habits of the children growing up. There was consensus that all the children drank. Drug use also seemed prevalent among the children, although some appeared more involved with drugs than others. Although Gwendolyn denied it, there was testimony from the other siblings that she sold drugs and Ronald and

Joe Jr., worked for her while they were teenagers. Harryl testified that Ronald supplied Loving with alcohol and marijuana. Gwendolyn testified that she saw Loving smoke marijuana and drink Wild Irish Rose when he was fourteen years old.

The family witnesses offered other details about the Loving family's background. Ms. Anderson discussed tragedies that occurred in Ms. Williams's life before she lived with Joe Loving Sr. There was also testimony as to Ms. Williams's belief in "roots," which was described as "voodoo" that caused bad things to happen to people. Ms. Anderson testified that Ms. Williams kept "clean homes" but there were big rats in the house. There was testimony that the family "struggled badly" and there "were times we ate beans with no bread, no meat. There were times we ate bread, no meat, no vegetable, or anything—no lettuce, no nothing; just mayonnaise and tomato sandwiches, banana sandwiches. So we struggled—wearing brother's and sister's hand-me-downs."

As to additional details revealed during the *DuBay* hearing, Wendolyn testified that Joe Loving Sr., sexually abused her when she was twelve years old. Gwendolyn moved out when she got pregnant at the age of thirteen. Mr. Williams, who eventually married Loving's mother, was described as an alcoholic, who constantly drank and cursed. He used to say things to the children like "'[t]he more education you have the stupider you are,' 'You're never going to amount to anything,' 'You don't have anything, you're not going to get anything.' "

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The records from the Department of Social Services document some of Ms. Williams's struggles in supporting her family as a single mother. The records show that they moved frequently due to poor housing conditions before moving to Oakbend Street. Various entries describe Ms. Williams in such terms as "hard worker," "a strict disciplinarian [and] at times rather harsh," "full control at home—good disciplinarian," "fiery temper." Loving's brief cites to the social worker's documentation of an instance when Ms. Williams was hospitalized and it was reported that one of the boys was not dressed adequately, that the house was very messy, that the children were not being sufficiently cared for, and that Ms. Williams objected to the assignment of a homemaker. By contrast, a follow-up entry after Ms. Williams returned home from the hospital reflects that Ms. Williams is a "wonderful mother and has no problem managing 8 children. The children are very well behaved and all follow their mother's guidance. They each have assigned tasks to do at home and the household is run very smoothly."

As part of the habeas proceedings, Ms. Vogelsang, a clinical social worker, performed a biopsychosocial assessment of Loving. During the *DuBay* hearing, Ms. Vogelsang testified that the most significant dynamic in Loving's family, which has spanned over generations, is a pattern of over reactive behavior to violent behavior in the face of loss, abandonment, or rejection. Ms. Vogelsang testified that these behaviors occurred "within a context of family violence, community violence, abuse, alcohol and drug use, neglect, and a lack of

intervention on a long term or consistent basis especially during the developmental years." Ms. Vogelsang identified a number of factors that when present in a child's home lead to children who are unable to bounce back from adversity, and she opined that most of these factors were present in Loving's home.[11]

Ms. Vogelsang discussed her views as to the significance of certain difficulties in Loving's childhood and addressed such issues as the traumatic social background of his parents, the nature of the violence between his parents, the troubling role his siblings played in his upbringing, his frequent moves among insufficient housing before the age of five, the incidents of violence brought against his home, and a pattern of drugs and alcohol in his family. Ms. Vogelsang also explained that when a child lives in a community where there is a constant fear of gang violence that at times has been realized against the child himself or a family member, "a child either has to isolate themselves and engage in all the behaviors that go along with that

11. These factors include lack of guidance and mental health intervention, divorce and separation, multiple moves, abuse, abandonment, homelessness, a disabled family member, immigrant status, lack of role models, growing up witnessing violence, the lack of consistent care giving, an inability to trust, worry about violence in the home which affects learning in school, impaired cognitive functioning, inability to deal with aggressive feelings, repression of feelings, sense of helplessness, and poor problem solving skills. According to Ms. Vogelsang, all applied to Loving except immigrant status and possibly impaired cognitive learning.

isolation, or they have to go out there and learn to survive on those streets along with the other kids." She presented a model designed to explain the impact of "psychological battering" on children and provided examples from Loving's life that exemplified the model. As to harsh physical discipline, Ms. Vogelsang explained that "[m]any in the mental health field believe that this has an impact on self worth, on self-esteem, that you're not valued as a human being."

Ms. Vogelsang stated:

> There is an accumulation of factors over time that do build, and if there is not anything to compensate for that, if there are not any positive factors, if there's not a degree of resilience, then those people tend to be at high risk as adults. They tend to have poor judgment and insight; they tend to make poor decisions. They start doing all of that as children and then it leads them into adulthood where they are doing the same things only now they're bigger and, you know, less safe.

Ultimately, in her written assessment, Ms. Vogelsang concluded:

> There was an accumulation of factors that over time resulted in the missocialization of Dwight Loving. Whatever potential he had, and he did have potential that was occasionally brought to light for brief periods, was not

> developed consistently enough to create the resilience he needed to resist the influence of his home and community during his developing years. Dwight succumbed to the patterns in his family and this is best illustrated by his inability to handle rejection and the self-medication of his pain with substances, both of which were prominent in the weeks and days prior to and during the crimes for which he stands convicted.

4. *Discussion*

The Supreme Court has repeatedly recognized that "evidence about the defendant's background and character is relevant because of the belief, long held by this society, that defendants who commit criminal acts that are attributable to a disadvantaged background, or to emotional and mental problems, may be less culpable than defendants who have no such excuse." *Boyde v. California*, 494 U.S. 370, 382 (1990) (citation, quotations marks, and emphasis omitted); *see also Wiggins*, 539 U.S. at 535 ("Petitioner thus has the kind of troubled history we have declared relevant to assessing a defendant's moral culpability."). Without question, this case involves a defendant with a disadvantaged background. However, in contrast to cases like *Rompilla*, 545 U.S. at 378, *Wiggins*, 539 U.S. at 515, and *Williams v. Taylor*, 529 U.S. 362, 369 (2000), which addressed defense counsel's complete failure to

inform the sentencing panel about the defendant's difficult past, trial defense counsel in this case presented a mitigation case to the members that devoted a significant degree of attention to Loving's troubled childhood.

In making his case for prejudice, Loving characterizes the difference between the mitigation case presented at sentencing and the mitigation case presented at the *DuBay* hearing as "remarkable." Loving argues that at the trial his defense counsel presented only a "superficial glance at the horrific reality of Dwight Loving's life" and did not provide "a true picture of the horrors of his life." He contends that the mitigation evidence presented at trial was "just general background information concerning the Loving family without any real focus on Dwight Loving" and that trial counsel highlighted this shortcoming during his argument to the members. Quoting *Wiggins*, 539 U.S. at 537, Loving argues that "[i]f the panel had heard the full extent of this 'excruciating life history' and its impact on his development and mental state 'there is a reasonable probability that at least one juror would have struck a different balance.' "

In a comparable context, the United States Court of Appeals for the Sixth Circuit articulated a framework that we find useful: "[T]o establish prejudice, the new evidence that a habeas petitioner presents must differ in a substantial way—in strength and subject matter—from the evidence actually presented at sentencing." *Hill v. Mitchell*, 400 F.3d 308, 319 (6th Cir.2005);

cf. Williams v. Allen, 542 F.3d 1326, 1342 (11th Cir.2008) (finding prejudice when the new mitigation evidence "paints a vastly different picture of [the defendant's] background" than testimony presented at trial); *Buckner v. Polk*, 453 F.3d 195, 207 (4th Cir.2006) (concluding that there is no prejudice under *Strickland* when new evidence merely "rounds out the details of a personal history already presented to the jury"). In this case, the mitigation case presented at the *DuBay* hearing provided some new information and arguably did more than "round[ ] out the details" of Loving's personal history by offering additional grim and graphic information about Loving's disadvantaged upbringing. *Buckner*, 453 F.3d at 207. However, it did not ultimately change the sentencing profile presented by defense counsel at trial. We do not believe that the new evidence sufficiently differed in strength and subject matter from the information considered by the members at trial to establish prejudice in this case.

As made clear by our description of the sentencing evidence above, the evidence presented at the trial showed that Loving was the youngest of eight children raised by a single mother on welfare in a dangerous section of the inner city. The members were informed that Loving's mother had to stop working because of her narcolepsy, that she struggled financially, and that she suffered severe physical abuse at the hands of Loving's alcoholic father in the presence of the children. The evidence showed that Loving's childhood environment and family life were marked by alcoholism, drugs, family violence, neighborhood violence, school violence, and gang violence.

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The evidence adduced during the *DuBay* hearing emphasized Loving's father's drinking problem and provided specific examples of violence in Loving's home and neighborhood. There is no doubt that the *DuBay* evidence added some detail about the violence the family witnessed and participated in, the financial struggles they endured, and the children's exposure to drugs and alcohol, but it was largely cumulative of the type of information presented to the members at trial. The evidence adduced during the *DuBay* also emphasized that Ms. Williams was a harsh disciplinarian and punished the children by using a belt, switch, or extension cord. Again, this is largely cumulative of evidence presented at sentencing where Wendolyn Black testified that their mother "would beat" the children, "whip [them] with the belt," or "hit [them] with her hand."[12]

We note that some new information came out of the *DuBay* proceedings. The *DuBay* hearing revealed instances where the children mistreated each other and Loving points to one instance of neglect documented in the social service records when their mother was

12. The *DuBay* evidence established that Loving's father also disciplined the children by hitting them with a belt, which differed from the trial presentation where he testified only that he spanked the children so that it would "hurt a little bit." However, the basic fact that the children endured harsh corporal punishment was consistent between the presentations, and the *DuBay* evidence does not raise allegations about physical abuse by Loving's parents any more so than the sentencing evidence presented at trial.

hospitalized and the children were without adequate adult supervision. While we do not diminish the troubling nature of these circumstances, we do not believe the evidence differs in kind or degree from circumstances as they were presented to the members. This is particularly so considering that the *DuBay* hearing offered some contrasting evidence on these particular points. Harryl Loving's testimony during the *DuBay* described how the children played together when they were young and denied that his sister abused them. After following up on Ms. Williams's return from the hospital the same social service records documenting the neglect characterize Loving's mother as a "wonderful mother."

We recognize, moreover, that the *DuBay* hearing also touched on the history of violence and abuse in Lucille Williams's upbringing, her belief in voodoo, Gwendolyn's teenage pregnancy and Wendolyn's sexual abuse, none of which were raised at the initial trial. Further, the *DuBay* hearing included testimony from a social worker explaining how Loving's traumatic childhood negatively impacted his development.

As to the new evidence, including the expert's testimony about the impact that Loving's tragic childhood had on his development, we simply do not find the additional information to be sufficiently compelling as to establish prejudice in this case, where the aggravating factors are overwhelming and where the members were presented with substantial information regarding Loving's disadvantaged youth. Loving killed

two cab drivers in separate instances by shooting them in the back of the head after each one complied with his demand for money. He tried to kill again but the third cab driver struggled the gun away from Loving as he was about to shoot him. The members found three required aggravating factors beyond a reasonable doubt and imposed the death penalty despite being instructed on nineteen mitigating factors by the military judge, including substantial evidence as to Loving's disadvantaged background.

Certainly the mitigation evidence presented at the *DuBay* hearing reinforced and emphasized Loving's traumatic childhood. It also provided some new details about the hardships he and his family endured as he was growing up and included expert testimony that he lacked the resilience to resist the influence of his home and community during his developing years and eventually succumbed to the patterns of his family life. However, the members were aware that Loving's childhood environment and family life were scarred by alcoholism, drugs, family violence, neighborhood violence, school violence, and gang violence. And while we do not diminish the potential value of expert testimony in capital sentencing proceedings that addresses how a traumatic childhood could negatively impact a defendant's development, the members in this case were at least exposed to this theory through defense counsel's argument, which urged them to consider that Loving's background made him less able to handle situations like those he confronted on the night

of his crimes.[13] We conclude that the new details as to these circumstances do not alter the sentencing profile in a material manner.

Reweighing the aggravating evidence against the totality of mitigating evidence, we are convinced beyond a reasonable doubt that if the members had been able to place the additional evidence adduced during the habeas proceedings on the mitigating side of the scale, a reasonable probability that at least one member would have struck a different balance does not exist. We conclude that Loving has failed to meet his burden to establish prejudice under *Strickland* and deny the petition for extraordinary relief in the nature of a writ of habeas corpus.

DECISION

Loving's petition for extraordinary relief in the nature of a writ of habeas corpus is denied.

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13. Defense counsel had been consulting with a forensic psychiatrist who was competent to assess the impact of Loving's traumatic social background on his development and to advise defense counsel in this regard. This expert was able to inform defense counsel's understanding of the social history nexus and to influence how defense counsel presented this information to the members.

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CONCUR BY: EFFRON; STUCKY (In Part)

CONCUR

EFFRON, Chief Judge (concurring):

I concur in the majority opinion. I write separately solely to note adherence to my previously expressed views in *Loving v. Hart*, 47 M.J. 438, 454-60 (C.A.A.F.1998) (Effron, J., concurring in part and dissenting in part), regarding the distinct issues raised in that writ-appeal concerning the voting procedures during sentencing at petitioner's court-martial.

STUCKY, Judge (concurring in part and in the result):

I have concerns similar to those raised by Judge Ryan regarding the appropriateness of applying to the review of this Court's own previous decisions the same habeas standards, under 28 U.S.C. § 2254 (2006), as federal courts apply in habeas reviews of state court decisions. Judge Ryan also makes an interesting point about our habeas corpus jurisdiction in cases in which direct appellate review has been completed. I write separately today, however, solely because I am convinced that the defense team's performance was not deficient. I concur with the majority's conclusion that, in any event, Loving failed to show that he was prejudiced by his counsel's performance.

Appendix A

I. Effective Assistance of Counsel

A. The Law

"A military accused is entitled under the Constitution and Article 27(b), Uniform Code of Military Justice, (UCMJ), 10 U.S.C. § 827(b) (2000), to the effective assistance of counsel." *Denedo v. United States*, 66 M.J. 114, 127 (C.A.A.F.2008). In reviewing claims of ineffective assistance of counsel, this Court employs the two-part standard of *Strickland v. Washington*, 466 U.S. 668, 692-93 (1984). *United States v. Gutierrez*, 66 M.J. 329, 330-31 (C.A.A.F.2008).

> First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable.

Strickland, 466 U.S. at 687. These same standards apply to capital sentencing proceedings. *Id.* at 686 (*Strickland* itself was a capital sentencing case).

Appendix A

"This Court reviews factual findings under a clearly erroneous standard, but looks at the questions of deficient performance and prejudice de novo." *United States v. Gutierrez*, 66 M.J. 329, 330-31 (citing *United States v. Paxton*, 64 M.J. 484, 488 (C.A.A.F.2007)); *United States v. Davis*, 60 M.J. 469, 473 (C.A.A.F.2005).

The first part of the test requires an appellant to "show that counsel's representation fell below an objective standard of reasonableness" "under prevailing professional norms." *Strickland*, 466 U.S. at 688 (citations omitted). "[A] court deciding an actual ineffectiveness claim must judge the reasonableness of counsel's challenged conduct on the facts of the particular case, viewed as of the time of counsel's conduct." *Id.* at 690.

> Judicial scrutiny of counsel's performance must be highly deferential. . . . A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time. Because of the difficulties inherent in making the evaluation, a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under

> the circumstances, the challenged action "might be considered sound trial strategy."

Id. at 689 (citations omitted); *United States v. Perez*, 64 M.J. 239, 243 (C.A.A.F.2006). "[T]he court should recognize that counsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment." *Strickland*, 466 U.S. at 690.

> As the Court of Appeals concluded, strategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable; and strategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation. In other words, counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary. In any ineffectiveness case, a particular decision not to investigate must be directly assessed for reasonableness in all the circumstances, applying a heavy measure of deference to counsel's judgments.

Strickland, 466 U.S. at 690-91.

Appendix A

B. Discussion

Appellant focuses his complaint of deficient performance on two aspects of the trial defense team's conduct: (1) the failure to hire a mitigation specialist; and (2) the claim that a mitigation theory was initially formulated, and the subsequent investigation was restricted to its narrow confines. I find neither argument persuasive.

(1) Failure to hire a mitigation specialist

Citing the 1989 American Bar Association Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases (ABA Guidelines), Appellant asserts that the "prevailing professional norms" at the time required the defense team to secure the assistance of experts who could assist in the investigation and presentation of mitigating evidence. ABA Guideline 11.4.1.D.7(D) provides that "[c]ounsel should secure the assistance of experts where it is necessary or appropriate for . . . presentation of mitigation." There is no requirement, even today, that a mitigation specialist be hired in every death penalty case.

Despite a gradually emerging practice of hiring a social worker or other mitigation specialist, the prevailing norm at the time of Appellant's trial was for the defense team to conduct a reasonable, independent investigation into the accused's family and background in an effort to discover mitigating evidence.

> While use of an analysis prepared by an independent mitigation expert is often useful, we decline to hold that such an expert is required. What is required is a reasonable investigation and competent presentation of mitigation evidence.

United States v. Loving, 41 M.J. 213, 250 (C.M.A.1994). As the *DuBay* hearing[1] judge concluded, there was certainly no consensus as to the need for mitigation specialists in 1989.

Appellant was sentenced to death on April 3, 1989, and the ABA did not adopt the Guidelines until its February 1989 Midyear Meeting, while the defense team was litigating Appellant's case. The ABA specifically noted in the introduction to the Guidelines that (1) "[w]hile some local standards may exist for capital representation, national guidelines on the assignment and performance of counsel in capital cases did not exist prior to these Guidelines," and (2) the ABA House of Delegates' resolution approving the Guidelines specifically provided "for such exceptions to the Guidelines as may be appropriate in the military." Although we have found the Guidelines "instructive," this Court has "expressly declined to mandate that military defense counsel meet" those guidelines. *United States v. Murphy*, 50 M.J. 4, 9 (C.A.A.F.1998) (concerning the appointment of death penalty qualified attorneys) (citing *Loving*, 41 M.J. at 300).

1. *United States v. DuBay*, 17 C.M.A. 147, 37 C.M.R. 411 (1967).

Appellant further argues that, contrary to the Supreme Court's holdings in *Wiggins v. Smith*, 539 U.S. 510 (2003), *Williams v. Taylor*, 529 U.S. 362 (2000), and *Strickland*, the defense team formulated its theory of the sentencing case before they fully investigated, restricted the rest of the investigation to facts supporting that theory, and thus failed to discover important mitigating evidence. In *Wiggins* and *Strickland*, the trial defense counsel attempted "to justify their limited investigation as reflecting a tactical judgment not to present mitigating evidence at sentencing and to pursue an alternative strategy instead." *Wiggins*, 539 U.S. at 521 (referring to *Strickland*, 466 U.S. at 673). In *Williams*, the Supreme Court found the "ineffectiveness claim meritorious" because "counsel's failure to uncover and present voluminous mitigating evidence at sentencing could not be justified as a tactical decision to focus on Williams' voluntary confessions, because counsel had not 'fulfilled their obligation to conduct a thorough investigation of the defendant's background.' " *Id.* at 522 (quoting *Williams*, 529 U.S. at 396).

Appellant's defense team did form a tentative sentencing theory shortly after being assigned to the case, and Appellant is correct in asserting that now, years after he was sentenced to death, his family has come forward with some mitigating evidence. But the defense team at the time acquired all of the relevant school, medical, mental health, and military records. They interviewed Appellant extensively, visited his hometown, spoke to family, friends, teachers, law enforcement officials, and the community

center boxing coach. They learned much about Appellant, his background, his family, and the community from which he entered military service, and were fully able to present that evidence to the court-martial. They also obtained the services of a forensic psychiatrist who had a law degree. The forensic psychiatrist reviewed all the records, including the sanity board and statements, spoke with the witnesses and at least one member of the sanity board, and examined Appellant.

Ultimately, the defense team decided not to have the forensic psychiatrist testify because they feared it would cause the military judge to release the full contents of the sanity board to the prosecution, revealing that Appellant had "sociopathic tendencies." This is precisely the kind of tactical decision that, under *Strickland*, we will not second-guess. 466 U.S. at 689; *United States v. Perez*, 64 M.J. at 243; *United States v. Anderson*, 55 M.J. 198, 202 (C.A.A.F.2001).

In *Wiggins* and *Williams* (529 U.S. at 396), the defense teams abandoned their investigations prematurely because of the constraints of their tentative theories of their cases. Appellant's defense team, on the other hand, did everything that the counsel in those cases failed to do. The scope of their investigation was reasonable under the prevailing professional norms "as seen 'from counsel's perspective at the time.' " *Wiggins*, 539 U.S. at 523 (quoting *Strickland*, 466 U.S. at 689). Their performance did not fall "below an objective standard of reasonableness." *Strickland*, 466 U.S. at 688. They were, therefore, not ineffective.

Appendix A

DISSENT BY: RYAN

DISSENT

RYAN, Judge, (dissenting):

I. Introduction

Direct judicial review of this case was completed in 1996 upon affirmation of Petitioner Loving's conviction by both this Court and the Supreme Court. *United States v. Loving* (*Loving I*), 41 M.J. 213 (C.A.A.F.1994); *Loving v. United States* (*Loving II*), 517 U.S. 748 (1996). In 2005, this Court considered and rejected Loving's petition for a writ of error coram nobis, but suggested that it could and would entertain a petition for a writ of habeas corpus. *Loving v. United States* (*Loving III*), 62 M.J. 235, 256 (C.A.A.F.2005). In 2006, the Court entertained the present petition and ordered an evidentiary hearing.[1] *Loving v. United States* (*Loving IV*), 64 M.J. 132, 132 (C.A.A.F.2006).

1. The Court ordered that Loving's case be returned directly to this Court following the evidentiary hearing, rather than first allowing the appropriate convening authority and court of criminal appeals (CCA) to review the military judge's factual findings. *Loving IV*, 64 M.J. at 152-53. The Court did so without considering how such makeshift collateral review of final cases would impact procedural mechanisms we have already made up. By commanding that the case be returned directly to this Court, the Court disturbed the multi-step review

(Cont'd)

The majority now rules on the merits of this petition, and determines that it should be denied. *Loving v. United States* (*Loving V*), __ M.J. __ (2-3) (C.A.A.F. 2009). To reach this conclusion, the majority entertains a habeas corpus petition for a case in which direct review is complete. This Court lacks jurisdiction to hear such a petition. Rather, jurisdiction falls squarely within the authority of Article III courts, both by statute and historic practice. I would dismiss the petition for lack of jurisdiction and, therefore, respectfully dissent.

(Cont'd)

of the records of courts-martial provided by the Uniform Code of Military Justice (UCMJ), *see generally* Articles 60, 66, 67, UCMJ, 10 U.S.C. §§ 860, 866, 867 (2006) (establishing the various steps for review of courts-martial), that our practice of remanding for " *DuBay* hearings" seeks to emulate. *See generally United States v. DuBay*, 17 C.M.A. 147, 149, 37 C.M.R. 411, 413 (C.M.A.1967) (setting forth the procedure for developing new factual matters after trial, to include a convening authority referring the case to a court-martial for an evidentiary hearing to enter findings of fact and conclusions of law on the record for further review by the convening authority and, if necessary, by the appropriate CCA and CAAF). This judicially crafted *DuBay* procedure at least creates the legal fiction that we are only reviewing facts in "the record," by having the new facts reviewed by the convening authority and CCA. *See Denedo v. United States*, 66 M.J. 114, 136 (C.A.A.F.2008) (Ryan, J., dissenting) (noting the "unwieldy and imperfect system" created by *DuBay* to enable additional factfinding). In this case the facts considered are not properly in "the record"—we do not have, because we bypassed it, the benefit of review of the military judge's factual findings by either the convening authority or the Army Court of Criminal Appeals.

Appendix A

II. The Jurisdiction Fiction: *Loving III*

The assumption of jurisdiction made by this Court in 2005 and echoed today was not based on any statute authorizing us to conduct habeas review of a case in which direct review has been completed. And it was made despite clear statutory jurisdiction over such cases by Article III courts. The labyrinthine reasoning that underlies the 2005 conclusion that this Court had jurisdiction is unsustainable. *See infra* pp. 12-13.

To the extent review of a case in which direct review is complete may be undertaken by this Court at all, the Supreme Court's recent decision in *United States v. Denedo* clarifies that such jurisdiction rests on the nature of the writ in question; it must constitute "direct review" of the original case under Article 67, UCMJ, and not rely on a general notion of continuing jurisdiction over cases where we once had jurisdiction. __ U.S. __ 129 S.Ct. 2213 (2009). *Compare id.* at 2221 (distinguishing jurisdiction over a coram nobis petition—"a belated extension of the original proceeding," dependent entirely upon whether there was jurisdiction over the original proceeding under Articles 66 and 67, UCMJ—and a habeas corpus petition, "'a separate civil proceeding'" (quoting *United States v. Morgan*, 346 U.S. 502, 505 n. 4 (1954)); *with Loving III*, 62 M.J. at 250 ("Congress gave this Court the authority to conduct a mandatory review of death penalty cases. Under this authority, this Court remains the primary judicial body with jurisdiction over Petitioner's case, and this Court

has authority to reexamine its prior decision in this case."). Even if the relevant statutes and historic practice did not clearly establish that Article III courts, and not this Court, have jurisdiction over this habeas petition, *Denedo* compels that conclusion. *See infra* pp. 12-13.

A. This Court Has No Jurisdiction Over This Habeas Petition Under Article 67, UCMJ

This Court's jurisdiction is strictly defined by Congress in Article 67, UCMJ. *See Christianson v. Colt Indus. Operating Corp.*, 486 U.S. 800, 818 (1988) (" 'Courts created by statute can have no jurisdiction but such as the statute confers.' " (quoting *Sheldon v. Sill*, 49 U.S. (8 How.) 441, 449 (1850))). Although created to oversee the military justice system, this Court is limited in both the types of cases it may review and the extent to which it may review them. *See* Article 67(c), UCMJ ("[T]he Court of Appeals for the Armed Forces may act only with respect to the findings and sentence as approved by the convening authority and as affirmed or set aside as incorrect in law by the Court of Criminal Appeals."); *Denedo*, 129 S.Ct. at 2223 (emphasizing that C.A.A.F.'s jurisdiction is limited by Article 67, UCMJ); *Clinton v. Goldsmith*, 526 U.S. 529, 535-37 (1999) (C.A.A.F.'s "jurisdiction is narrowly circumscribed. . . . [It] is accorded jurisdiction by statute (so far as it concerns us here) to 'review the record in [specified] cases reviewed by' the [CCAs]. . . . [T]he CAAF spoke too expansively when it held itself to be 'empowered by

the All Writs Act to grant extraordinary relief in a case in which the court-martial rendered a sentence that constituted an adequate basis for direct review'. . . ." (citations omitted)).

Following direct review by this Court, an accused may petition the Supreme Court for review. Article 67a, UCMJ, 10 U.S.C. § 867a (2006). After the Supreme Court has acted on that petition, the "judgment as to the legality of the proceedings is final," ending direct judicial review. Article 71(c), UCMJ, 10 U.S.C. § 871 (2006); *accord* Rule for Courts-Martial (R.C.M.) 1209(a). The Supreme Court's affirmation of Loving's conviction in 1996 marked the end of direct judicial review in this case. *See* Article 71(c), UCMJ; *Loving IV*, 64 M.J. at 137.

After direct judicial review is complete in a capital case, the military justice system provides three possible extra-judicial remedies that stand between an accused and the carrying-out of his sentence: a successful petition to the Judge Advocate General for a new trial under Article 73, UCMJ, 10 U.S.C. § 873 (2006); action taken by a service secretary under Article 74, UCMJ, 10 U.S.C. § 874 (2006); and presidential approval or commutation of the capital sentence under Article 71(a), UCMJ. While the availability of these extra-judicial remedies may impact the res judicata effect of judgments under Article 76, UCMJ, 10 U.S.C. § 876 (2006), it does not change the fact that direct judicial review is complete.

Appendix A

In contrast with the direct judicial review authorized and dictated under Articles 66 and 67, UCMJ, and R.C.M. 1201-1205 and 1209, no statutory authority, guidance, or process for collateral review by this Court exists once direct review has been completed.[2] *See Noyd v. Bond*, 395 U.S. 683, 695 n. 7 (1969) (distinguishing between this Court's power to issue a writ of habeas corpus in cases "like the present one [a case pending

2. Nor does practice within the military justice system reflect a different understanding. Since the current military justice system was created under the UCMJ in 1951, there have been twelve executions and fourteen death sentences that were affirmed on direct review but commuted by the President. Dwight H. Sullivan, "Executive Branch Consideration of Military Death Sentences," *Evolving Military Justice* 137 (Eugene R. Fidell & Dwight H. Sullivan eds., 2002). In no capital case other than this one has a writ of habeas corpus been sought in any court before the President approved the sentence. (For cases in which a habeas petition was filed *after* presidential approval of the death sentence, see, for example, *Thomas v. Davis*, 249 F.2d 232 (10th Cir.1957); *Day v. Wilson*, 247 F.2d 60 (D.C.Cir.1957); and *Suttles v. Davis*, 215 F.2d 760 (10th Cir.1954).) And no military prisoner with a capital sentence—including one prisoner currently facing a presidentially approved capital sentence—has ever requested a writ of habeas corpus from this Court after direct review was completed, even after the President acted. *See* Petitioner's Response to Motion for Reconsideration, To Lift Stay of Execution and Request for Oral Argument at 5, *Gray v. Gray*, No. 08-3289-RDR (D.Kan. Dec. 2, 2008) ("Private Gray is seeking federal habeas court review for the first time and he has not delayed commencing this action. In fact, until the President approved his death sentence, there was no action available.").

direct review], which may ultimately be reviewed by [the] Court" and "a case which the [Court] is not authorized to review under the governing statutes");[3] *Burns v. Wilson*, 346 U.S. 137, 141 (1953) (plurality opinion) (recognizing a petition for a new trial as the only mechanism within the military justice system, apart from ordinary appellate review, to collaterally attack a judgment); *United States v. Murphy*, 50 M.J. 4, 5-6 (C.A.A.F.1998) (recognizing the absence of rules or procedures for post-conviction collateral attacks in the military justice system and thus reviewing an ineffective-assistance-of-counsel claim on direct review); *Witham v. United States*, 355 F.3d 501, 505 (6th Cir.2004) ("[N]either the [UCMJ] nor the Manual for Courts-Martial provides for collateral review within the military courts."); *Gilliam v. Bureau of Prisons*, 2000 U.S.App. LEXIS 3684, at *4, 2000 WL 268491, at *2 (8th Cir. Mar. 10, 2000) (" 'Unlike the practice in the United States Circuit Courts of Appeal and District Courts, neither the UCMJ . . . nor the Manual for Courts-Martial . . . provides procedures for collateral, post-conviction attacks on guilty verdicts.' " (quoting *Murphy*, 50 M.J. at 5)).

3. The latter part of this quotation is neither cited nor addressed by the majority. And with respect to the part of the quotation that *is* cited, the majority fails to explain how, where direct review is completed, the fact that the President has not yet acted pursuant to Article 71(a), UCMJ, transforms this case into one where further review by this Court is authorized. No review of presidential action under Article 71(a), UCMJ, is provided for or authorized by any statute. Other than by *ipse dixit*, this case is not one that "may ultimately be reviewed by" this Court. *Noyd*, 395 U.S. at 695 n. 7.

B. Article III Courts Have Jurisdiction Over This Habeas Petition

Article III courts, though, have clear statutory jurisdiction and authority to collaterally review convictions by petitioners held in custody when constitutional error is alleged. *See* 28 U.S.C. § 1331 (2006) (providing Article III district courts with original jurisdiction over federal questions); *id.* § 2241(a) ("Writs of habeas corpus may be granted by the Supreme Court, any justice thereof, the district courts and any circuit judge within their respective jurisdictions."); *id.* § 2241(c)(3) (extending writ of habeas corpus to prisoners "in custody in violation of the Constitution or laws or treaties of the United States"); *Denedo*, 129 S.Ct. at 2226 n. 1 (Roberts, C.J., dissenting) (recognizing that court-martial convictions may be collaterally attacked in an Article III court, which has jurisdiction under §§ 1331 and 2241); *Goldsmith*, 526 U.S. at 537 n. 11 (1999) ("[O]nce a criminal conviction has been finally reviewed within the military system, . . . [a servicemember] is entitled to bring a habeas corpus petition, see 28 U.S.C. § 2241(c), claiming that his conviction is affected by a fundamental defect that requires that it be set aside."); *Burns*, 346 U.S. at 139 (plurality opinion) (recognizing that the federal civil courts have jurisdiction over habeas corpus petitions and that "[b]y statute Congress has charged them with the exercise of that power" (citing § 2241; *In re Yamashita*, 327 U.S. 1, 8 (1946))).

And while the statutes are already clear regarding the court system to which a habeas corpus petition should be addressed after direct review is complete, it is further instructive that Article III courts have been collaterally reviewing court-martial convictions where direct review has been completed since at least the mid-1800s. *See Ex parte Reed*, 100 U.S. 13, 19-23 (1879) (entertaining a habeas corpus petition alleging that a military court-martial lacked jurisdiction over the petitioner). Since that time, debate has focused not on to whom the writ should be addressed, but rather on the appropriate procedures, claims, and standards of review for collaterally attacking court-martial convictions in federal court. *See, e.g.*, *Gusik v. Schilder*, 340 U.S. 128, 131 (1950) (requiring exhaustion of military remedies before allowing collateral review in federal courts); *Burns*, 346 U.S. at 142 (plurality opinion) (recognizing collateral review of constitutional claims that have not been "fully and fairly" considered by the military justice system); *Schlesinger v. Councilman*, 420 U.S. 738, 749-53 (1975) (holding that Article 76, UCMJ, does not affect the jurisdiction of Article III courts or insulate military convictions from collateral review in federal court). By comparison, only since the mid-1960s has this Court in any way asserted the power of collateral review over final convictions. *See United States v. Frischholz*, 16 C.M.A. 150, 152-53, 36 C.M.R. 306, 308-09 (1966) (holding that the All Writs Act empowers this Court to issue a post-conviction writ of coram nobis).

C. The All Writs Act Cannot And Does Not Give This Court Jurisdiction Where None Exists Under Article 67, UCMJ

Despite the absence of express statutory jurisdiction to entertain a habeas corpus petition, this Court in 2005 found that it had such authority under the All Writs Act, 28 U.S.C. § 1651, based on our prior direct review jurisdiction under Article 67, UCMJ. *Loving III*, 62 M.J. at 245-46, 250; *cf. Loving V*, __ M.J. __ (7) (asserting that cases pending presidential action remain subject to extraordinary writ consideration by this Court). To do so, the Court distinguished *Goldsmith*, where the Supreme Court held that this Court erred by directing the Air Force not to drop a servicemember from its rolls (an administrative action), stating this Court was "not given authority, by the All Writs Act or otherwise, to oversee all matters arguably related to military justice." 526 U.S. at 536. The *Loving III* Court found *Goldsmith* inapplicable because unlike that case, it reasoned, *Loving III* involved a finding and sentence imposed by a court-martial that was not final under Article 76, UCMJ, such that the extraordinary relief requested would be in aid of the Court's direct review jurisdiction under Article 67, UCMJ. *Loving III*, 62 M.J. at 246.

But Article 76, UCMJ, does not change the fact that direct review is complete. Article 76, UCMJ, codifies the common-law principle of finality of judgments; it neither expands nor contracts the subject-matter jurisdiction of either this Court, *Denedo*, 129 S.Ct. at 2221, 2223

(emphasizing that the principle that Congress decides federal courts' jurisdiction "applies with added force to Article I tribunals" and noting that Article 76, UCMJ, sets out a rule of finality rather than a jurisdictional bar), or Article III courts, *Councilman*, 420 U.S. at 749. *See also Loving III*, 62 M.J. at 247 (recognizing that the President's approval or commutation of the death sentence "is not part of the direct judicial review of the case").

Even more curiously, the *Loving III* Court explicitly recognized that it was empowered to act by neither the general federal habeas statute, § 2241, nor by any other congressionally enacted habeas corpus statute. 62 M.J. at 255 (noting that the plain language of §§ 2241 and 2255 did not include this Court). The Court nonetheless went on to determine that the All Writs Act—a residual source of writ authority in aid of existing jurisdiction—authorized it to issue the writ in aid of its *former* direct review jurisdiction. *Id.* at 256. *See generally* Article 67(a)(1), UCMJ (providing for mandatory review of "all cases in which the sentence, as affirmed by a Court of Criminal Appeals, extends to death").

Supreme Court precedent addressing this Court's authority under the All Writs Act, however, makes clear this holding was in error. Although the Supreme Court has confirmed that this Court may sometimes issue writs under the Act, its interpretation of the scope of the Act and of our jurisdiction demonstrates that the Act does not authorize this Court to entertain a collateral attack through a habeas corpus petition that is not part of the

direct review authorized by statute. *See Noyd*, 395 U.S. at 695 n. 7 (noting that although there was no longer "any doubt as to the power of the Court of Military Appeals to issue an emergency writ of habeas corpus" under the All Writs Act, the power was recognized only for cases "which may ultimately be reviewed by th[e] court" and not cases "which the [court] is not authorized to review under the governing statutes").

In *Goldsmith*, the Supreme Court made it clear that jurisdiction on direct review of a court-martial conviction does not establish jurisdiction for all potential post-conviction remedies. 526 U.S. at 536. Reversing this Court's decision, the Supreme Court stated that this Court could not always "act as a plenary administrator *even of criminal judgments it has affirmed.*" *Id.* (emphasis added). The Supreme Court noted our opinion "spoke too expansively" when it decided that former jurisdiction over the accused's court-martial conviction triggered the provisions of the All Writs Act. *Id.*

Likewise, in *Denedo* the Supreme Court reaffirmed that the authority granted under the All Writs Act "does not determine the anterior question whether military courts have jurisdiction to entertain a petition for [extraordinary relief]." 129 S.Ct. at 2221. The Act itself is "not a source of subject-matter jurisdiction." *Id.* at 2222. Further, in holding that this Court could issue a writ of coram nobis under the facts of *Denedo*, the Supreme Court relied heavily on the nature of coram

nobis as a "belated extension of the original proceeding during which the error allegedly transpired." *Id.* at 2221. A military court's jurisdiction to issue such a writ was thus derived from "the earlier jurisdiction it exercised to hear and determine the validity of the conviction on direct review." *Id.* at 2222.

Unlike the writ in *Denedo*, the relief requested by Loving—a writ of habeas corpus—is not appropriately entertained by this Court under the All Writs Act for three reasons. First, unlike a writ of coram nobis, habeas corpus is not a "belated extension" of the original court-martial proceeding. It is instead an entirely separate civil proceeding in which the petitioner asserts his rights against those who hold him in custody. *See id.* at 2221 ("[*C*]*oram nobis* is 'a step in the criminal case and not, like habeas corpus where relief is sought in a separate case and record, the beginning of a separate civil proceeding.' " (quoting *Morgan*, 346 U.S. at 505 n. 4)); *Riddle v. Dyche*, 262 U.S. 333, 335-36 (1923) ("The writ of habeas corpus is not a proceeding in the original criminal prosecution, but an independent civil suit. . . ."); *Ex parte Tom Tong*, 108 U.S. 556, 559 (1883) ("The prosecution against [petitioner] is a criminal prosecution, but the writ of habeas corpus which he has obtained is not a proceeding in that prosecution.").

Second, even if a post-conviction habeas corpus petition fell within the ambit of this Court's All Writs Act authority as an extension of our Article 67, UCMJ,

review (which it does not), entertaining such a petition is inappropriate in the present case because the All Writs Act is limited to circumstances where no other remedy is available. *Goldsmith*, 526 U.S. at 537 ("The All Writs Act invests a court with a power essentially equitable and, as such, not generally available to provide alternatives to other, adequate remedies at law."). Here, another remedy *is* available: a habeas corpus petition in an Article III court.

Despite recognizing that such a writ was an available remedy for military prisoners, the *Loving III* Court nonetheless went on to discount that remedy on the ground that Article III courts would, based on the doctrine of exhaustion, abstain from considering Loving's petition until the President approved Loving's death sentence. *See* 62 M.J. at 248-50; *Loving V*, __ M.J. __ (4-5). Lack of presidential approval notwithstanding, I do not believe the exhaustion doctrine prevents Article III review of Loving's petition. This Court decided in 2005 that the possibility of clemency from the President is not part of the direct judicial review process and, as such, is not an available remedy sufficient to preclude issuing a writ of coram nobis.[4] *Loving III*, 62 M.J. at

4. Strangely, while holding that presidential action was an *inadequate* remedy to preclude a writ of coram nobis—which may only be filed in the absence of any other remedy, *see, e.g.*, *Denedo*, 129 S.Ct. at 2220—this Court went on to determine that the same presidential action *was* an *adequate-enough* remedy to prevent Article III judicial review under the principle of exhaustion—which also requires that there be no other remedy, *Gusik*, 340 U.S. at 131-32, 71 S.Ct. 149. *Loving III*, 62 M.J. at 247, 249-50. This purported distinction makes no sense.

247 ("We conclude that presidential action is not an adequate remedy at law. Presidential action is akin to a state governor's action, and as such, is not part of the direct judicial review of the case."). Our determination of what the UCMJ means receives great deference in Article III courts. *Middendorf v. Henry*, 425 U.S. 25, 43 (1976); *see also Noyd*, 395 U.S. at 694, 696. It follows, therefore, that the exhaustion doctrine would not necessarily preclude those courts from hearing Loving's petition based on the mere possibility of executive action.

But even if Article III courts chose to view presidential approval of the sentence in a capital case as a necessary predicate to exhaustion, that view would not necessarily deprive those courts of review power. The Supreme Court has made clear that exhaustion is a prudential doctrine, not a jurisdictional one; it remains subject to the circumstances of the case, including the potential for long delay.[5] *See Boumediene v. Bush*, 128 S.Ct. 2229, 2275 (2008) (refusing to apply the exhaustion doctrine in cases where petitioners faced "months, if not years, of delay"); *see also Denedo v. United States*, 66 M.J. 114, 122 (C.A.A.F.2008) (acknowledging that the Supreme Court has not precluded "the possibility that the circumstances of a particular case might warrant

5. Of course, the doctrine of exhaustion is prudential in part because of principles of comity and, relatedly, because remedies not yet asserted may moot the question being considered by a collaterally reviewing court. *Councilman*, 420 U.S. at 756-57.

consideration of a habeas petition by an Article III court prior to exhaustion." (citing *Councilman*, 420 U.S. at 761)). Thus, an Article III court could choose to hear a military prisoner's habeas petition in light of significant potential delay in presidential action.[6]

Finally, the usual canon of statutory construction that favors specific statutes over general ones suggests that the All Writs Act cannot be asserted to extend our Article 67, UCMJ, jurisdiction in the face of specific habeas corpus statutes. *See Hinck v. United States*, 550 U.S. 501, 506 (2007) (repeating "the well-established principle that, in most contexts, 'a precisely drawn, detailed statute pre-empts more general remedies' " (quoting *EC Term of Years Trust v. United States*, 550 U.S. 429, 434 (2007)). "The All Writs Act is a residual source of authority to issue writs *that are not otherwise covered by statute*. Where a statute specifically addresses the particular issue at hand, it is that authority, and not the All Writs Act, that is controlling."

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6. Regardless, there is little reason to believe that a military prisoner who has been sentenced to death will seek habeas corpus relief before presidential approval, which provides its own delay, given the natural interest a prisoner has in delaying his execution. *See* Dwight H. Sullivan, *The Last Line of Defense: Federal Habeas Review of Military Death Penalty Cases*, 144 Mil. L.Rev. 1, 5 n.13 (1994) ("Because death row inmates have an obvious interest in delay of any kind, no service member under a military death sentence would have an incentive to seek habeas relief before presidential action on the sentence.") (citation omitted).

Penn. Bureau of Corr. v. U.S. Marshals Serv., 474 U.S. 34, 43 (1985) (emphasis added). Even if we were to ignore the plain language of Article 67, UCMJ, and assume a theoretical continuing jurisdiction over capital cases in which we once had jurisdiction, such as that advanced by the *Loving III* Court, *see* 62 M.J. at 244 ("[W]e conclude that this Court's subject matter jurisdiction continues even after the Supreme Court's decision affirming Petitioner's death sentence."), the fact remains that Article 67, UCMJ, provides only a general grant of authority, and the All Writs Act provides only a broadly defined mechanism to issue writs in aid of already-existing jurisdiction.

In contrast, Article III habeas corpus power is set down in reticulated statutes detailing not only which courts have the authority to issue writs of habeas corpus, 28 U.S.C. § 2241 (2006), but also specifics related to, *inter alia*, the form, timing, filing, standards of review, and statutes of limitation for such writs, 28 U.S.C. §§ 2241-55 (2006).[7] Thus, even if the Court's statutory jurisdiction could be stretched as far as the majority assumes, this Court may not entertain Loving's petition because an Article III court could properly consider a

7. Which is not to suggest that these reticulated statutes apply perfectly to the review of military courts martial. But any difficulty in Article III courts' habeas review of courts-martial convictions neither divests them of jurisdiction to conduct such review, nor gives this Court authority to expand its own jurisdiction. It is for Congress to change the who and the how of habeas review, not this Court.

military prisoner's habeas corpus petition and the All Writs Act does not allow this Court to act in the face of another, specific statute. *See Goldsmith*, 526 U.S. at 537.[8]

III. This Court's Foray Into Habeas Corpus Law Helps Neither This Nor Future Petitioners

I do not doubt that Loving sought a writ of coram nobis here in 2005 because there was presumably nothing to lose. If we entertained it, there was a possibility we would afford him relief. If we refused to entertain it, he was presumably no worse off. But *we* proposed he file a habeas petition, and, with the Court's judgment today, he is afforded no relief and is worse off if the judgment is allowed to stand.

And Loving has no incentive to let the judgment stand.[9] The Court's 2005 expansion of jurisdiction

8. This seems all the more obvious where, as here, the legal issue is not one that turns on any interpretation of military law or nuance of military service, but rather presents the constitutional claim of ineffective assistance of counsel—a claim with which Article III courts are at least as familiar as this Court.

9. Even though Loving now has every incentive to challenge this judgment, we ought not to wait for such a challenge; it is our responsibility to ensure we have jurisdiction, not his. *See, e.g.*, *Ashcroft v. Iqbal*, 129 S.Ct. 1937, 1945 (2009) ("Subject-matter jurisdiction cannot be forfeited or waived and should be considered when fairly in doubt."); *Arbaugh v. Y & H Corp.*, 546 U.S. 500, 514 (2006) ("[S]ubject-matter jurisdiction,

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beyond the statutory limits established by Congress was not only unnecessary, given the statutory availability of recourse to an Article III court, but unfortunate. First, we have hastened post-conviction collateral review of a habeas corpus petition in a capital case before the President has acted to approve the sentence. *See supra* note 6.

Second, we have foreclosed initial review of Loving's habeas corpus petition by an Article III court on this claim, potentially placing him in the unenviable position of being a successive petitioner. Congress has moved to limit habeas corpus by restricting successive petitions presenting the same claims:

> No circuit or district judge shall be required to entertain an application for a writ of habeas corpus to inquire into the detention of a person pursuant to a judgment of a court

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(Cont'd)

because it involves a court's power to hear a case, can never be forfeited or waived. Moreover, courts, including this Court, have an independent obligation to determine whether subject-matter jurisdiction exists, even in the absence of a challenge from any party." (citation and quotation marks omitted)); *United States v. Cotton*, 535 U.S. 625, 630 (2002) ("[S]ubject-matter jurisdiction, because it involves a court's power to hear a case, can never be forfeited or waived. Consequently, defects in subject-matter jurisdiction require correction regardless of whether the error was raised in district court.").

> of the United States if it appears that the legality of such detention has been determined by a judge or court of the United States on a prior application for a writ of habeas corpus, except as provided in section 2255.

28 U.S.C. § 2244(a). If an Article III court concludes that this Court, the United States Court of Appeals for the Armed Forces, is "a court of the United States" under § 2244, the Article III court would not be required to hear the petition. *See Loving V*, __ M.J. __ (7) (recognizing "the potential effect of a habeas petition before our Court on future habeas petitions filed in the Article III courts").

Third, in light of the above, the standard of review indiscriminately plucked[10] by this Court to review habeas corpus challenges to our own prior decisions is especially cold comfort to Loving. *See Loving IV*, 64 M.J. at 145 (adopting the standard of review from 28 U.S.C. § 2254 (2000), which, in part, restricts Article III court review of a state proceeding to whether the state decision was contrary to or an unreasonable application of federal law); *accord Loving V*, __ M.J. __ (8). Deference to

10. Other than asserting its jurisdiction to entertain this habeas petition and selecting its own standard of review, this Court elected not to provide any further guidance to future petitioners as to when and how they should approach us with their claims. Habeas corpus unmoored from any procedural rules and provisions is a novelty, to say the least. The Court failed to consider the prudence of asserting jurisdiction and adopting a standard of review in a vacuum.

state court decisions under § 2254 reflects the need to balance federal review against respect for proceedings conducted by a separate sovereign—the state. *See Williams v. Taylor*, 529 U.S. 420, 436-37 (2000) (discussing § 2254's deference to state court proceedings). Such deference is inexplicable and inappropriate when this Court reviews its own prior holdings. A petitioner seeking collateral review of his court-martial at this Court faces the unusual and uphill battle of convincing us that our own previous actions were not just erroneous, but unreasonable.

While such deference may or may not be warranted when an Article III court is reviewing a decision of this Court, it seems untoward to apply it to our own previous decisions. Most people—a category that arguably includes most judges—would not have adopted a position in the first instance if they thought it was unreasonable.

IV. Conclusion

The writ of habeas corpus is "the most celebrated writ in English law," William Blackstone, 3 *Commentaries* 129 (1768), and I do not begrudge Loving's desire to exercise his constitutional right to challenge on collateral review the alleged ineffective assistance of counsel he received at his capital trial.[11]

11. Further, while I take issue with this Court's continued expansion of its own jurisdiction beyond the limits established

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But absent statutory changes from Congress, the appropriate venue for review of this petition is the Article III courts. Therefore, I respectfully dissent.

(Cont'd)

by Congress, this Court could provide an adequate venue to evaluate Loving's conviction *if* the UCMJ provided jurisdiction over cases in which direct review is completed (preferably with related procedural guidance, in the case of habeas petitions) and *if* the U.S. Code did not already invest jurisdiction over these cases in Article III courts. Whatever its beginnings, far from being "a rough form of justice," *Reid v. Covert*, 354 U.S. 1, 35 (1957), the military justice system today, including this Court, generally provides "substantial procedural protections and provision for appellate review by independent civilian judges [to] 'vindicate servicemen's constitutional rights.' " *Hamdan v. Rumsfeld*, 548 U.S. 557, 586 (2006) (quoting *Councilman*, 420 U.S. at 758). This is confirmed by the extensive and careful review received in this case to date. *See United States v. Loving*, 34 M.J. 956 (A.C.M.R.1992) (direct appeal); *United States v. Loving*, 34 M.J. 1065 (A.C.M.R.1992) (petition for reconsideration); *United States v. Loving*, 41 M.J. 213 (C.A.A.F.1994) (mandatory direct review); *United States v. Loving*, 42 M.J. 109 (C.A.A.F.1995) (petition for reconsideration); *Loving v. Hart*, 47 M.J. 438 (C.A.A.F.1998) (petition for writ of mandamus to CCA); *Loving v. United States*, 62 M.J. 235 (C.A.A.F.2005) (petitions for writ of coram nobis); *Loving v. United States*, 64 M.J. 132 (C.A.A.F.2006) (petition for writ of habeas corpus). But the fact that this Court may be competent to adjudicate Loving's constitutional claim does not answer the antecedent question whether Congress has authorized it to do so once direct review is completed.

APPENDIX B — *DuBAY* HEARING FINDINGS OF FACT AND CONCLUSIONS OF LAW DATED MAY 26, 2008

United States

v.

Private Dwight J. Loving,
Correctional Holding Detachment
United States Disciplinary Barracks
Fort Leavenworth, KS 66027

***DuBay* Hearing**
Findings of Fact and Conclusions of Law

26 May 2008

The United States Court of Appeals for the Armed Forces (CAAF) returned this case for an evidentiary hearing (*United States v. DuBay*, 17 C.M.A. 147 (1967)) to "address the matters related to the defense investigation of Petitioner's background and other matters that may have produced evidence in either extenuation or mitigation during the capital sentencing proceeding.

The CAAF directed the *DuBay* judge to enter findings of fact and conclusions of law to address the following matters (*Loving v. U.S.*, 64 M.J. 132, 152 (2006)):

1. Identify potential sentencing evidence, if any, alleged by the defense that was omitted or incompletely presented at trial.

2. Address the facts, if any, under (1) that would have been developed through a reasonable investigation by a competent attorney under *Strickland*. In this regard, what did trial defense counsel do to investigate information to present in the capital sentencing phase of the court-martial? What information, if any, did the counsel know or should have known that would have triggered an investigation into Petitioner's traumatic background or the omitted or incomplete evidence identified under (1)?

3. What impact did any deficiency in investigating this case, if any, have on tactical decisions made by trial defense counsel (including the decision to use or not to request or to use any expert assistance)? Whether any information identified under (1) could have led to a change in defense counsel's trial tactics in sentencing phase?

4. Were trial defense counsel aware of the information contained in Petitioner's affidavits filed at this Court regarding violence in Petitioner's family home and neighborhood? The *DuBay* hearing will evaluate the credibility and reliability of all factual information Petitioner has filed with this Court to support his habeas corpus petition.

5. The *DuBay* hearing will inquire into any other matters that relate to the issue of performance of trial defense counsel of the duty to conduct a reasonable investigation into the background of Petitioner, the omitted or incomplete evidence identified under (1), or

any other evidence relevant to the capital sentencing proceeding, in light of prevailing professional norms at the time of the trial.

6. Whether there is a reasonable probability that, but for the omission of information identified under (1) through (5), the result of the sentencing proceeding would have been different? This requires a reweighing of the evidence adduced at trial and in the *DuBay* proceeding to determine this question: Had the panel been confronted with this evidence, was there a reasonable probability it would have returned a different sentence? The test is whether there is a reasonable probability that at least one member of the panel would have struck a different balance thereby not voting for a death sentence?

A general discussion of the applicable legal standard is omitted. An analysis of the application of *Strickland v. Washington*, 466 U.S. 668 (1984) as further explained in *Wiggins v. Smith*, 539 U.S. 510 (2003) to the facts of this case will be incorporated in response to the specific mandates in 1 through 6 above.

The following are the Court's findings of fact and conclusions of law:

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1. *Identify potential sentencing evidence, if any, alleged by the defense that was omitted or incompletely presented at trial.*

Generally, PVT Loving alleges his defense counsel were deficient in thoroughly investigating and presenting evidence of (1) his alcohol and drug use prior to the murders; (2) his family and social history; and (3) the significance/impact of his family and social history. The Court disagrees (see specific findings in paragraph 3 and 4 below).

Specifically, PVT Loving alleges that his counsel failed to present the following potential sentencing evidence during his court-martial (*DuBay* AE LVI):

"– The history of violence and alcoholism in the families of both of PVT Loving's parents.

– The desire of PVT Loving's mother, which he learned of at an early age, to abort him because she was perpetually angry and complained that she had too many children.

– The physical abuse by PVT Loving's father.

– The aggression forced by PVT Loving's sisters while he and his brothers were left in their care.

– The physical abuse by PVT Loving's sisters while he and his brothers were left in their care.

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– The extreme poverty in the family and the multiple moves to homes that, at times, had deplorable conditions.

– PVT Loving's introduction to and mentoring in the use of drugs and alcohol by his father and older siblings when he was just a child."

PVT Loving also specifically alleges that his counsel incompletely presented the following sentencing evidence during his court-martial (*DuBay* AE LVI):

"– The violence between PVT Loving's parents.

– The alcoholism of PVT Loving's father.

– The "discipline" meted out by PVT Loving's mother.

– The "care" PVT Loving's older sisters provided while his mother worked nights and at other times.

– Evidence concerning PVT Loving's step-father and why he was the "worstest [sic] man" known to PVT Loving's brother, Ronald.

– The ongoing and extremely violent nature of the "family fights" the Loving family had with neighbors "every day."

– The severity of gang violence in the communities in which PVT Loving lived and PVT Loving's personal experience in this regard."

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2. *Address the facts, if any, under (1) that would have been developed through a reasonable investigation by a competent attorney under Strickland. In this regard, what did trial defense counsel do to investigate information to present in the capital sentencing phase of the court-martial? What information, if any, did the counsel know or should have known that would have triggered an investigation into Petitioner's traumatic background or the omitted or incomplete evidence identified under (1)?*

a. *Trial defense counsel's investigation for the capital sentencing phase of the court-martial.*

Shortly after PVT Loving's apprehension on 13 Dec 88, PVT Loving's detailed defense counsel, CPT William Ibbotson, CPT John Smart, and MAJ David Hayden, met with PVT Loving. Confronted with a detailed written and video-taped confession, his defense counsel recognized that the primary issue in their representation of PVT Loving was whether PVT Loving "was to be executed or imprisoned, not whether he was guilty or not guilty." In other words, from the beginning of their involvement in the case, all three defense counsel realized that their focus would be on "saving his life." *DuBay* Transcript [hereinafter DR] 272, 738, and 769-770. The Court finds this was a reasonable strategy under the circumstances.

Most, if not all, aspects of case preparation and presentation of evidence were jointly discussed and evaluated by all three defense counsel. After his

appointment to the defense team as an expert consultant, Dr. Armitage was also actively involved in the discussions concerning case preparation and presentation of evidence.

Based on their initial discussions with PVT Loving, his defense counsel believed that the primary focus of the mitigation case should be that PVT Loving "would not have engaged in this sort of behavior had he not been heavily motivated and influenced by" Nadia Pessina, his girlfriend at the time. Although it was believed that this was "the most worthy mitigating thing," they would also seek information on "anything that would predispose [PVT Loving] to violence; brain injuries, any kind of abnormalities, any mental issues." DR 273.

The defense, in furtherance of these beliefs, decided early on to focus their investigation and pretrial preparation on 1) Ms. Pessina's ability to manipulate PVT Loving (DR 273, 739, and 819); 2) obtaining funding to travel to Rochester, NY to meet with family and friends of PVT Loving; and 3) obtaining funding for the expert assistance of a civilian forensic psychiatrist.

On 20 Dec 88, the first of several interviews of Ms. Pessina by the defense team was conducted. DR 299. It became clear that PVT Loving was fixated on Ms. Pessina. DR 296, 781; *DuBay* AE XXXVIII, Enclosure 22 at 4; *DuBay* PE 4 at Tab B. Interviews with CPT Charles Bush (PVT Loving's Battery Commander) on 21 Dec 88 and subsequent interviews with SGT James Key (PVT Loving's supervisor) bolstered the early

theory that Ms. Pessina had what appeared to be an extraordinary influence over PVT Loving i.e., he appeared to be doing well as a Soldier under the leadership of SGT Key, but things went bad when Ms. Pessina came into the picture. *DuBay* AE XXXVIII, Encl 1.

The defense team decided that MAJ Hayden would initially be responsible to investigate PVT Loving's background prior to his military service and to develop "the mitigation case." DR 257, 796. Accordingly, MAJ Hayden met several times with PVT Loving, starting on 16 Dec 88, to talk with him about his past, his family, and his friends. The purpose of these meetings was to get to know PVT Loving and his background. DR 770.

On 21 Dec 88, the defense team requested funding for two defense attorneys to travel to Rochester, NY. The Government approved funding for one attorney, and the defense team decided that MAJ Hayden would go.

Before his trip, MAJ Hayden learned that a Criminal Investigation Command (CID) agent, SA Jimmy Gee, had visited Rochester to do a background investigation of PVT Loving. MAJ Hayden met with SA Gee who gave him contact information for a local police officer, Detective Jimmy Verna. The defense also received a copy of CID's investigation report. *DuBay* PE 4.

In discussing the trip to Rochester, CPT Ibbotson suggested that MAJ Hayden investigate "information of antisocial behavior of Private Loving;" "whether he

boxed without headgear and other erratic behavior;" and "to see how he behaved in pressure situations while growing up." *DuBay* AE XXXVIII, Tab 1. Major Hayden testified that he went to Rochester "looking for specific information" as suggested, but stated that "if something new had been raised by a family member or a coach, or a doctor, or investigator, I would have...tried to investigate that as well." DR 801-802.

PVT Loving provided MAJ Hayden information as to who he should see while in Rochester i.e., family members and other people who could provide background information. DR 774-776, *DuBay* PE 7.

Prior to the trip to Rochester, MAJ Hayden spoke to PVT Loving's mother to coordinate his visit with the family.

MAJ Hayden traveled to Rochester, NY on 17 Jan 89. *DuBay* AE XXXVIII, Enclosure 1. He spent all of 18 Jan 89 (the whole day, and into the evening) and part of 19 Jan 89, interviewing some family members, friends, and others (e.g., boxing coach, school teacher, Detective Verna).

The purpose of the visit, according to MAJ Hayden, was "to find out information, as much information as I could about Dwight Loving's background." As suggested by CPT Ibbotson, he was also looking for evidence of impulsive behavior, as well as evidence of head trauma.

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In Rochester, MAJ Hayden met with several of PVT Loving's family members including his mother, father, and some of PVT Loving's siblings. He learned more about PVT Loving's "upbringing" his "family structure" and his "relationship with his brothers and sisters."

MAJ Hayden learned "a lot" from his interview of Mr. Johnson, PVT Loving's childhood boxing coach. Mr. Johnson was the closest thing PVT Loving had to a father figure. MAJ Hayden asked Mr. Johnson if PVT Loving took any significant blows to the head. Mr. Johnson informed him that PVT Loving "rarely got hit in the head" because he was such a good boxer. Mr. Johnson also discussed that while PVT Loving was a good boxer, he became distracted when it came to women.

Based on his discussions in Rochester with PVT Loving's family and friends, and Mr. Johnson, MAJ Hayden concluded that PVT Loving could be "easily influenced" and "could be more easily manipulated than your typical person." DR 778-781. This conclusion was consistent with, and further bolstered, the defense's initial theory that PVT Loving "would not have engaged in this sort of behavior had he not been heavily motivated and influenced by" Nadia Pessina, his girlfriend at the time. DR 273.

As further preparation for trial, CPT Abbotson conducted additional background investigation by telephone of PVT Loving's history prior to his military service. He spoke with PVT Loving's mother, four

brothers, and his sister Gwendolyn. He also spoke by telephone with Detective Verna. DR 263, *DuBay* DE C.

In addition to these investigative efforts, CPT Ibbotson and CPT Smart also interviewed unit witnesses, Ms. Pessina, friends of Ms. Pessina, and confinement officers supervising Private Loving in pretrial detention. Although the defense is not alleging this part of the original pretrial investigation was deficient, the Court finds that the result of these investigative efforts added to the "circumstances of this case." These investigative efforts also supported the initial defense theory concerning the negative influence that Ms. Pessina had over PVT Loving; and conversely, that PVT Loving responded positively to strong personal leadership such as that provided by SGT Key and Mr. Johnson.

Pursuant to Court order, PVT Loving was evaluated IP R.C.M. 706. The written reports concerning that evaluation were dated 6 Feb 89 and 17 Feb 89. The results of that evaluation included a diagnosis of "Antisocial Personality Disorder." In other words, PVT Loving was diagnosed as having sociopathic tendencies. In the full report that only the defense team received, the clinical description stated that PVT Loving "rebels against rules and authority, and has a preoccupation with self-indulgent pleasure seeking with little thought for the consequences of the feelings and the rights of others." This finding, and the effort to avoid the Government from obtaining access to this knowledge (and any use of this information in the court-martial), formed the basis for many of the subsequent tactical

decisions related to the pre-trial investigation and case presentation. This concern will be addressed in greater detail below.

On 6 Jan 89, the defense team submitted a request to the convening authority for appointment of a forensic psychiatrist to the defense team. *DuBay* PE 1; DR 291. Because the issue of expert assistance was not resolved prior to referral, the defense team filed an *ex parte* motion with the trial court on 14 Feb 89. The defense team supported the motion by proffering that they had information that PVT Loving came from a broken home; that his father was a physically abusive alcoholic; that PVT Loving was introduced to drugs and alcohol at an early age; and that PVT Loving came from a poor part of Rochester. *DuBay* PE 4.

The issue concerning the expert assistance of a forensic psychiatrist was resolved on 27 Feb 89, when COL (Dr.) David Armitage was appointed to the defense team. The following day CPT Ibbotson telephonically "briefed" Dr. Armitage and gathered the "psych report (sealed) to send to Armitage w/ other info on case." He spoke with Dr. Armitage again on 6 March. Dr. Armitage arrived at Fort Hood on 22 March and met with PVT Loving the next day. He then "reviewed case" with the defense counsel "until midnight." AE XXXVIII, Tab 1; *DuBay* DE C.

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b. *What information, if any, did the counsel know or should have known that would have triggered an investigation into Petitioner's traumatic background or the omitted or incomplete evidence identified under (1)?*

Unlike the counsel in *Wiggins*, the defense counsel in this case did conduct an investigation into PVT Loving's background. The issue therefore is whether trial defense counsel "chose to abandon their investigation at an unreasonable juncture [thereby] making a fully informed decision with respect to sentencing strategy impossible." (*Wiggins*, at 527-528). Accordingly, the question reworded is "What information, if any, did the counsel know or should have known that would have triggered an **[additional]** investigation into Petitioner's traumatic background or the omitted or incomplete evidence identified under (1)?"

The defense alleges (*DuBay* AE LVI) that the following information would have triggered a more complete investigation by defense counsel into PVT Loving's traumatic background or the omitted or incomplete evidence identified under (1).

"– PVT Loving came from a broken home. PE 4, Tab C.

– PVT Loving's father was an alcoholic with a criminal record, who beat his wife despite her pregnancy and the presence of his children. ROT at 1579-81. He was also physically abusive to PVT Loving. PE 4, Tab C.

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– PVT Loving was born due to an "unwanted pregnancy." He also reported being the victim of "physical abuse" and having "nightmares/night terrors" as a child. During his grade school years, he reported being a "witness to violence." AE XXXVIII, Tab 9 (Addendum to Sanity Board Report and Other Sanity Board Documents).

– PVT Loving was "the youngest member of a large family" without a father or "an effective Mother during his formative years." PE 4, Tab C.

– During most of PVT Loving's childhood, another man, who was "outspoken" and disliked by some of the Loving children for "saying what he wanted to say," lived in the home with PVT Loving's mother. ROT at 1586-88. PVT Loving's brother described his step-father as the "worstest [sic] man I've ever met in my life, and I've met some bad people." ROT at 1613.

– PVT Loving was introduced to "drugs, sex, and alcohol abuse at age 9." PE 4, Tab C.

– PVT Loving grew up in a "'war zone' atmosphere" in a "black 'ghetto' area." PE 4, Tab C.

– Drugs and street gangs were prevalent in Rochester. A gang burned down the home of PVT Loving's sister and had beaten up PVT Loving's brother. ROT at 1604. PVT Loving had to hold off a gang alone in trying to help a friend. ROT at 1684-85.

– The Loving family had to fight with their neighbors at times to survive. ROT at 1607.

– PVT Loving attended schools described by a former Rochester Police Officer as "armed camps." ROT at 1618.

– PVT Loving was diagnosed with alcohol, cannabis, and cocaine abuse, as well as several personality disorders. AE XXXVIII, Tab 8 (Sanity Board Report).

– PVT Loving had "a long history of poly-drug and alcohol abuse beginning at age nine or ten. He started using drugs at the encouragement of his older siblings." AE XXXVIII, Tab 9."

The Court disagrees and finds that the trial defense counsel conducted a reasonable investigation, the results of which successfully developed evidence that supported their sentencing theme. The defense team had no evidence that PVT Loving's family members were resistant to providing information i.e., there was no indication that the assistance of someone with the experience and training of Ms. Vogelsang was necessary to assist with the investigation. Moreover, there was no indication to PVT Loving's trial defense counsel that any additional investigation would develop noncumulative or otherwise useful evidence for the sentencing case. This was especially true after the written report UP R.C.M. 706 was provided to the defense, finding that PVT Loving was a sociopath. The defense team reasonably believed that this finding

precluded them from presenting expert opinion testimony of the impact/significance of PVT Loving's traumatic background if they were to prevent the Government from access to the full report and prevent the potential devastating impact such evidence might have on the panel.

c. *The facts, if any, under (1) that would have been developed through a reasonable investigation by a competent attorney under Strickland.*

The Court finds that a reasonable investigation as required by *Stickland*, as further explained in *Wiggins*, was conducted under the circumstances of this case. PVT Loving's defense counsel did not choose to abandon their investigation at an unreasonable juncture.

3. *What impact did any deficiency in investigating this case, if any, have on tactical decisions made by trial defense counsel (including the decision to use or not to request or to use any expert assistance)? Whether any information identified under (1) could have led to a change in defense counsel's trial tactics in sentencing phase?*

The investigation in this case was not deficient. The tactical decisions made by trial defense counsel were reasonable, under the circumstances of this case. The additional detailed information and the additional anecdotal evidence that a more in-depth investigation may have developed concerning PVT Loving's traumatic background as identified under (1), would not have changed any tactical decisions made by defense counsel.

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PVT Loving's trial defense counsel's initial assessment was that the best chance of "saving his life" was to focus on the negative influence that Ms. Pessina had over PVT Loving. They believed that they could "save his life" if they could demonstrate that PVT Loving "would not have engaged in this sort of behavior had he not been heavily motivated and influenced by" Ms. Pessina. Their initial decision that the influence of Ms. Pessina was "the most worthy mitigating thing" was subsequently bolster at every stage of their investigation. Whether it was through interviews with individuals in Rochester (e.g., Mr. Johnson), interviews of PVT Loving's supervisors (e.g., SGT Key and CPT Bush), interviews with PVT Loving, or Dr. Armitage's evaluation, the defense counsel's assessment that PVT Loving's susceptibility to influence by others, was supported by their investigation. Their dec'sion to focus on PVT Loving's positive reaction to strong supportive influences such as Mr. Johnson and SGT Key and to portray Ms. Pessina as the negative influence that led to the commission of the offenses was reasonable.

One purpose of investigating the background of the accused from birth to commission of the offense is to discover all reasonably available information upon which to make a reasonable tactical decision as to how to best present a presentencing case that will avoid a sentence to death. In the absence of any specific mitigation theme, a reasonable tactical decision may be to present everything possible in a "shotgun" approach in the hopes that something will favorably resonate with at least one panel member. In this case, however, the

defense team identified a mitigation theme, conducted a reasonable investigation to develop evidence that supported the validity of that theme, and then reasonably focused their presentation of evidence to support that theme. The Court finds that the trial defense team's investigation and presentation of defense mitigation evidence was reasonable. The efforts complied with the professional standards required of trial defense counsel involved in capital defense litigation in 1989.

In the face of a legitimate concern i.e., being required pursuant to M.R.E. 302 to reveal to the Government the full report generated UP R.C.M. 706, the tactical decision to not present expert testimony of the impact/ significance of PVT Loving's traumatic background was reasonable. However, having laid the foundation for the consideration of such evidence in voir dire, the defense did call the following witnesses at the presentencing hearing: PVT Loving's father, mother, his brother Ronald Loving, and his sister Wendolyn Black. Each testified regarding aspects of PVT Loving's life and upbringing. In addition to the family members, the trial defense team called Detective Verna to talk about PVT Loving's neighborhood, and Mr. Johnson to discuss both the neighborhood and what he knew of the Loving family. SSG Alvin Mercado and SSG Vincent Sanchez of the Ft. Hood detention facility were called to demonstrate PVT Loving's good behavior while in pretrial confinement. The trial defense team also admitted stipulated testimony from PVT Loving's brother Harryl Loving, and Kenneth Wilson (PVT Loving's high school

English teacher). The trial defense team also submitted, among other evidence in extenuation and mitigation, PVT Loving's school records from Rochester and his father's arrest records. Contrary to the view of PVT Loving's current counsel, the Court finds this to be much more than a "skeletal" presentation of PVT Loving's traumatic background.

Consistent with their sentencing theme, the defense called SGT Key and Ms. Pessina during the merits portion of the trial, to lay the foundation for their subsequent argument that PVT Loving was easily manipulated by Ms. Pessina.

Based on their assessment of PVT Loving during preparation with him for his testimony, the defense team reasonably concluded that PVT Loving was likely to do more harm than good if he testified. They discussed this concern with PVT Loving and PVT Loving chose not to testify. Without PVT Loving's testimony, the Court finds that the only evidence of his alcohol and drug use prior to the murders was Ms. Pessina (see findings re Ms. Joseph and Ms. Sedberry below). At the original trial Ms. Pessina testified on the merits that PVT Loving snorted one-and-a-half lines of cocaine on the night of the robberies and that he only smoked marijuana once or twice; she testified that on the night of the murders, PVT Loving drank beer, but did not smoke any marijuana.

The decision to use, or not to request or to use, a particular type of expert, including a mitigation

investigator, is evaluated for reasonableness on a case-by-case basis, in light of the totality of trial defense counsel's investigative efforts. As found above, the defense team had no evidence that PVT Loving's family members were resistant to providing information. Based on the cooperation of PVT Loving's family members, there was no indication that the assistance of someone with specialized investigative experience and training was necessary to assist with the investigation. Moreover, there was no indication to PVT Loving's trial defense counsel that any additional investigation would develop additional noncumulative or otherwise useful evidence for the sentencing case. The trial defense team conducted sufficient investigation to reasonably determine not to call as a witness Dr. Armitage, or not to request or to use any additional expert assistance.

4. Were trial defense counsel aware of the information contained in Petitioner's affidavits filed at this Court regarding violence in Petitioner's family home and neighborhood? The DuBay hearing will evaluate the credibility and reliability of all factual information Petitioner has filed with this Court to support his habeas corpus petition.

The defense team was generally aware of the credible factual information contained in the affidavits regarding Private Loving's traumatic background and the violence in PVT Loving's family home and neighborhood. The defense team was not aware of all of the specific details of violence in Private Loving's family home and neighborhood as evidenced by Ms. Vogelsang's

"incomplete/partial" biopsychosocial assessment submitted in appellate pleadings or the "complete/supplemental" biopsychosocial assessment prepared for and considered at the DuBay hearing. The Court finds, however, that some of the "specific details of violence" reported by Ms. Vogelsang were inaccurately characterized in her biopsychosocial assessment (e.g., the "intentional" hanging of Ronald Loving by Gwendolyn Black reported by Ms. Vogelsang that this Court finds was an accident during childhood play; the extent of the reported physical abuse of PVT Loving by his sisters).

The Court finds the testimony of all witnesses during the *DuBay* hearing to be generally credible and reliable, except the testimony of Ms. Gerlinde Joseph and Ms. Beverly Sedberry.

Both Ms. Sedberry and Ms. Joseph claimed that they knew about PVT Loving's drug use on the evening of the murders and that they were never contacted by the trial defense team. CPT Ibbotson stated in his affidavit that the trial defense team spoke to both individuals prior to trial. *Dubay* AE XXXVIII, Enclosure 4. MAJ Hayden testified at the *DuBay* hearing that he personally interviewed Ms. Joseph prior to trial.

Ms. Joseph testified at the *DuBay* hearing that she saw PVT Loving using drugs when she got home from work, shortly after 2000, and that he never left the house until they went to the club that evening. DR 317-319, 323-324. Based on the evidence presented at trial, PVT

Appendix B

Loving committed the murders between 2000 and 2100, before returning to the house, and then later went to the club with Ms. Joseph and Ms. Pessina. Ms. Joseph does not recall who drafted her affidavit, and that she "floated through" it before signing it. DR 328. In her affidavit, she stated that "Nadia and I went to Fort Hood and talked to one of Dwight's defense attorney." During the *DuBay* hearing, she denied ever speaking to any lawyers. The Court finds that neither her affidavit, nor her testimony at the *DuBay* hearing, is credible and reliable.

Ms. Sedberry's testimony was vague and unspecific. She claims to have seen PVT Loving consuming cocaine and marijuana, but did not confirm she saw him using drugs the day of the murders. DR 468, 474-75. In her affidavit, Ms. Sedberry did not state that she saw PVT Loving consume drugs on the day of the murders, only that he was asking about cocaine. *DuBay* AE XXXVIII, Enclosure 16. Ms. Sedberry was an alcoholic at both the time of the offences and when she made the affidavit. DR 473. The Court finds that the information in her affidavit and her testimony unreliable and not credible.

Considering the potential significance that information tending to show PVT Loving was intoxicated or impaired by drugs during the commission of the offense or at the time he confessed to the crimes would have had on the merits (e.g., specific intent; motion to suppress confession), there is no doubt that if either individual had mentioned drug and alcohol use, the topic would have been explored by the trial defense counsel.

Moreover, even lay persons understand the importance of information that would show an accused "was not in his right mind…spaced out on drugs and alcohol…didn't know what he was doing…would not have killed anyone if he had not been high on drugs and alcohol." *DuBay* AE XXXVIII, Enclosure 15. The Court finds that both Ms. Sedberry and Ms. Joseph were interviewed by the trial defense counsel, and that neither individual provided information concerning drug and alcohol use by PVT Loving on the evening of the murders.

The affidavits of Harryl Loving, Wendolyn Black, and Gwendolyn Black were drafted by an unknown third party and presented to each individual for signature, not read (or not read thoroughly) by the individual prior to signing, and contained inaccurate or false information. Accordingly, the Court finds that the information in the affidavits of Harryl Loving, Wendolyn Black, and Gwendolyn Black are not reliable. Compare DR. 565, *DuBay* AE XXXVIII, Enclosure 11; DR 627, *DuBay* AE XXXVIII, Enclosure 3, DR 539-542, *DuBay* AE XXXVIII, Enclosure 12; DR 542-543, 565, 628-629, *DuBay* AE XXXVIII, Enclosure 5.

The Court finds that information contained in the affidavits of CPT Ibbotson, MAJ Hayden, and CPT Smart very credible and reliable. The information was corroborated through the testimony of each individual at the *DuBay* hearing, and is further supported by other evidence (e.g., pretrial notes, log entries, trial documents).

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The Court was unable to evaluate the reliability of the information in the affidavits of Lucille Williams and Ronald Loving. However, the Court does find credible the information contained in those affidavits that is consistent with the testimony those witnesses provided at trial or as otherwise corroborated by the testimony of the other witnesses at trial or during the *DuBay* hearing.

5. *The DuBay hearing will inquire into any other matters that relate to the issue of performance of trial defense counsel of the duty to conduct a reasonable investigation into the background of Petitioner, the omitted or incomplete evidence identified under (1), or any other evidence relevant to the capital sentencing proceeding, in light of prevailing professional norms at the time of the trial.*

The Court allowed extensive testimony and documentary evidence regarding the performance of counsel under prevailing professional norms for capital litigation in 1989. The Court considered all the information submitted by the parties on this issue (including the 1989 American Bar Association (ABA) Guidelines for the Appointment and Performance of Counsel in [illegible] Penalty Cases) (hereinafter ABA Guidelines).

There was some evidence that the prevailing professional norm in capital litigation prior to 1989 was "incompetency." DR 432. This general concern appears to have been the impetus for the ABA to "create"

guidelines for capital litigation to assist the legal profession. DR 432. The guidelines ultimately adopted by the ABA provided counsel a suggested approach to capital litigation. This approach was apparently viewed by the ABA to satisfy Constitutional requirements for competent representation by trial defense counsel in capital litigation, and to provide a means for a greater chance of success (i.e., avoiding a death sentence) based on sample individual case studies. The ABA Guidelines reflect an attempt to establish a systemic mindset to capital litigation. The Court finds, however, that any attempt to interpret the ABA Guidelines as minimum standards of performance in 1989 (i.e., requirements), is misplaced. The guidelines published the collective view of the drafters, as adopted by the ABA, which propagated an opinion of what the professional norm should be. See also *DuBay* DE A and DE B and *DuBay* AE XXXVIII, Enclosure 7.

The prevailing professional norm in preparing for a capital case was for the defense attorneys to conduct a reasonable, independent investigation into the client's life history, in an effort to discover mitigating evidence for trial. *Dubay* PE 5 at 13 (ABA Guideline 11.4.1.); DR 414-415, 426; *Dubay* AE XXXVIII, Enclosure 7; *Strickland*, 466 U.S. at 691; *Wiggins*, 539 U.S. at 524-525. The investigation for mitigating evidence is an ongoing, dynamic process, which includes all of the efforts of the trial defense team in preparing for the court-martial that may impact tactical decisions in the presentencing phase of the court martial. This process is not completed until the conclusion of the defense

presentation of evidence (including the final decision by the accused to testify or provide an unsworn statement).

While it was the emerging practice of many attorneys in 1989 to use social workers or other "mitigation specialists" to conduct background investigations, it was not a requirement, nor was there sufficient evidence presented in the DuBay hearing for the Court to find that it was so prevalent in either civilian or military practice that it constituted a minimum standard of practice required in all capital cases. A "procrustean bed" approach to measure defense counsel performance in capital litigation is not now, nor should it ever be, the applicable litmus test under *Strictland*. Under the circumstances of this case, the Court finds that the investigation by the trial defense counsel was reasonable, and all tactical decisions based thereon, were also reasonable.

6. *Whether there is a reasonable probability that, but for the omission of information identified under (1) through (5), the result of the sentencing proceeding would have been different? This requires a reweighing of the evidence adduced at trial and in the DuBay proceeding to determine this question: Had the panel been confronted with this evidence, was there a reasonable probability it would have returned a different sentence? The test is whether there is a reasonable probability that at least one member of the panel would have struck a different balance thereby not voting for a death sentence?*

Appendix B

Having read the complete record of trial of the original court-martial, and after reweighing all of the evidence adduced at trial and considering the evidence presented in the *DuBay* hearing, the Court is convinced beyond a reasonable doubt that had the panel been confronted with the evidence at issue, there is no reasonable probability that at least one member of the panel would have struck a different balance thereby not voting for a death sentence and the result of the sentencing proceeding would not have been different.

THEODORE E. DIXON
COL, JA
Military Judge

APPENDIX C — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE ARMED FORCES DENYING PETITION FOR RECONSIDERATION DATED SEPTEMBER 1, 2009

United States Court of Appeals
for the Armed Forces
Washington, D.C.

USCA Misc. Dkt. No. 06-8006/AR
Crim. App. Dkt. No. 19891123

Dwight J. LOVING,

Petitioner

v.

UNITED STATES,

Respondent

ORDER

On consideration of Petitioner's petition for reconsideration of this Court's decision, 68 M.J. 1 (C.A.A.F. 2009), it is, by the Court, this 1st day of September, 2009,

ORDERED:

That said petition for reconsideration be, and the same is, hereby denied.

Appendix C

For the Court,

/s/ William A. DeCicco
Clerk of the Court

cc: The Judge Advocate General of the Army
Counsel for Petitioner (NORRIS, Esq.)
Counsel for Respondent (KAZIN)
Amici Curiae (MCCLUER; TRACY; FIDELL; SALTZBURG)

No. 09-989

In the Supreme Court of the United States

DWIGHT J. LOVING, PETITIONER

v.

UNITED STATES OF AMERICA

(CAPITAL CASE)

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ARMED FORCES

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

In 1994, on direct appeal, the Court of Appeals for the Armed Forces denied petitioner relief on his claim that he received constitutionally ineffective assistance of counsel. In 2006, the court of appeals agreed to entertain a petition for extraordinary relief to revisit that decision. Following an extensive evidentiary hearing, the court of appeals denied relief on the ground that petitioner had not shown prejudice. The question presented is:

Whether the court of appeals' handling of petitioner's post-conviction petitions for extraordinary relief violated constitutional standards applicable to the speedy handling of appeals and required the court of appeals to presume prejudice on petitioner's underlying claim of ineffective assistance.

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In the Supreme Court of the United States

No. 09-989

DWIGHT J. LOVING, PETITIONER

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UNITED STATES OF AMERICA

(CAPITAL CASE)

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ARMED FORCES

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-78a) is reported at 68 M.J. 1. Previous decisions and orders of that court are reported at 64 M.J. 132, 62 M.J. 235, 54 M.J. 459, 49 M.J. 387, 47 M.J. 438, 42 M.J. 109, and 41 M.J. 213. The opinions of the Army Court of Military Review affirming petitioner's death sentence are reported at 34 M.J. 1065 and 34 M.J. 956. The opinion of this Court affirming petitioner's death sentence on direct review is reported at 517 U.S. 748.

JURISDICTION

The judgment of the court of appeals was entered on July 17, 2009. A petition for reconsideration was denied on September 1, 2009 (Pet. App. 106a-107a). On Novem-

ber 30, 2009, the Chief Justice extended the time within which to file a petition for a writ of certiorari to and including December 30, 2009. On December 23, 2009, the Chief Justice further extended the time to January 29, 2010, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1259(4), but as explained below, see pp. 13-14, *infra*, that provision does not confer jurisdiction to review the decision of the court of appeals denying petitioner relief.

STATEMENT

In 1989, following a general court-martial, petitioner was convicted of premeditated murder, felony murder, attempted murder, and robbery (four specifications), in violation of Articles 118(1) and (4), 80, and 122 of the Uniform Code of Military Justice (UCMJ), 10 U.S.C. 918(1) and (4), 880, and 922 (1988). He was sentenced to death. Pet. App. 2a. The United States Army Court of Military Review (CMR) affirmed, 34 M.J. 956, and subsequently denied reconsideration, 34 M.J. 1065. (The Army CMR is now known as the Army Court of Criminal Appeals (CCA).) The United States Court of Appeals for the Armed Forces (CAAF) affirmed the conviction and death sentence, 41 M.J. 213, modified, 42 M.J. 109. This Court granted review of the sentence and affirmed, 517 U.S. 748.

Following multiple petitions for coram nobis and other post-conviction relief, all of which were denied by the military courts, petitioner filed the instant petition for a writ of habeas corpus directly in the CAAF. After ordering an evidentiary hearing, 64 M.J. 132, and receiving the findings of fact and conclusions of law from that hearing, Pet. App. 79a-105a, the CAAF denied the petition. *Id.* at 1a-48a.

1. Petitioner was an Army private stationed at Fort Hood, Texas. On December 11, 1988, petitioner robbed two convenience stores at gunpoint but obtained only small amounts of money. The next evening, petitioner decided to rob taxicab drivers in the hope of obtaining more money. Petitioner called a cab to take him from a grocery store to Fort Hood. The driver of the cab was Private Christopher Fay, a soldier working as a cab driver for extra money. Petitioner directed Fay to a secluded area of Fort Hood, demanded money at gunpoint, took Fay's money, and shot Fay twice in the back of the head, killing him. Petitioner walked back to his barracks, counted the money he had stolen from Fay, and called another cab minutes later. He directed the driver, retired Army Sergeant Bobby Sharbino, to a secluded street in Killeen, Texas, where he stole Sharbino's money pouch, wallet, and cigarette lighter. He then ordered Sharbino to lie down on a car seat and shot him in the head, killing him. See 517 U.S. at 751; 41 M.J. at 229.

Later that night petitioner took his girlfriend, Nadia Pessina, to a nightclub in Killeen. When they left, they got into a cab driven by Howard Harrison. After dropping off Pessina, petitioner directed Harrison to a secluded area and robbed him at gunpoint. Petitioner tried to kill Harrison, but he got away. Petitioner was arrested the next day. He made a videotaped confession and told the police that his gun and other items of incriminating evidence were at Pessina's house. Searches outside and (with Pessina's consent) inside the house recovered the murder weapon, Sharbino's cigarette lighter, and other evidence. 41 M.J. at 229-231.

2. The general court-martial found petitioner guilty of the felony murder of Fay, the premeditated murder

of Sharbino, the attempted murder of Harrison, and multiple counts of robbery, in violation of Articles 118, 80, and 122 of the UCMJ, 10 U.S.C. 918, 880, and 922 (1988).[1]

During the guilt phase of the court-martial proceeding, petitioner's three military defense counsel (Pet. App. 84a) referred to petitioner's troubled childhood and background in their arguments. During the sentencing phase, defense counsel presented the following witnesses in mitigation: Joe Loving, Sr., petitioner's father; Lucille Williams, his mother; Ronald Loving, his brother; Wendolyn Black, his sister; Lord Johnson, his boxing coach; and Detective Verna of the Rochester, New York police department. Petitioner also presented the stipulated testimony of Harryl Loving, his brother, and Kenneth Wilson, his childhood teacher. Finally, petitioner introduced his school records and the arrest records of his father and a childhood friend into evidence. *Id.* at 25a-26a.

The mitigation evidence showed that petitioner had a troubled childhood and upbringing. See Pet. App. 22a-23a. Specifically, petitioner was the youngest of eight children. Petitioner's father drank heavily, had a long police record, was physically abusive, did not know petitioner's age or birthday, and ceded all childrearing to petitioner's mother. Petitioner's mother worked nights to support the family, but illness ultimately forced her to quit work. Petitioner was a poor student, a frequent truant, and a disciplinary problem. Petitioner's boxing coach described him as a "follower." In sum, petitioner "grew up in an economically depressed, violent, drug-

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[1] The military judge dismissed some counts as multiplicitous. 41 M.J. at 231-232.

infested neighborhood with substandard schools." 41 M.J. at 249.

In closing argument, petitioner's defense counsel argued against the death penalty in part because of petitioner's troubled childhood. Pet. App. 31a-33a. The military judge instructed the court members on 19 mitigating factors, including six that directly related to petitioner's troubled childhood, including that he grew up in a low-income urban area; that he was raised by a single parent with seven other siblings; his father's effect on him; his inadequate schooling; his exposure to violence as a youth; and that he was a "follower." *Id.* at 22a-24a, 32a.

The court-martial unanimously found, as aggravating factors, that the premeditated murder of Sharbino was committed while petitioner was engaged in a robbery; that petitioner, having been found guilty of the premeditated murder of Sharbino, was found guilty of another murder in the same case; and that, in the felony murder of Fay, petitioner had acted as the triggerman. 517 U.S. at 751; see Rules for Courts-Martial 1004(c)(7)(B), (7)(J) and (8) (1995). The court-martial also concluded unanimously that those aggravating factors "substantially outweighed" any mitigating factors. 41 M.J. at 302.

3. The UCMJ requires that court-martial convictions resulting in a death sentence be reviewed by the court of criminal appeals for the appropriate armed service and, if that court affirms, by the CAAF. 10 U.S.C. 866(b)(1), 867(a)(1). The Army CMR affirmed petitioner's conviction. 34 M.J. 956, reconsideration denied, 34 M.J. 1065.

In his briefs to the CAAF, petitioner raised 70 claims of error, including a claim that his defense counsel had rendered ineffective assistance by failing to call a miti-

gation expert and to present mitigating evidence relating to his troubled background.[2] Petitioner supported his argument with, among other things, affidavits from his mother, Lucille Williams; his sisters, Gwendolyn and Wendolyn Black; and his brothers, Ronald and Harryl Loving. Pet. 1993 CAAF Br. 85-129; Pet. CAAF App. Exhs. AA-EE.[3] Except for Gwendolyn Black, all of those individuals had presented testimony in person or by stipulation at petitioner's trial. In his brief on appeal, petitioner did not request an evidentiary hearing on his ineffective-assistance claim.

The CAAF affirmed. 41 M.J. 213. The CAAF rejected petitioner's ineffective-assistance claim, holding first that defense counsel acted reasonably in not calling a mitigation expert, and second, that "defense counsel investigated [petitioner's] background and competently presented his evidence during the sentencing phase of the trial." *Id.* at 250.

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[2] Petitioner had raised an unrelated ineffective-assistance claim in the Army CMR. *See* 34 M.J. at 1067-1068.

[3] In the military, a defendant may (but is not required to) raise an ineffective assistance claim on direct appeal; the practice is not disfavored as in federal courts, *see Massaro* v. *United States*, 538 U.S. 500 (2003). The service Courts of Criminal Appeals have fact-finding power under 10 U.S.C. 866(c), but the CAAF has no fact-finding power. 10 U.S.C. 867(c). When a defendant raises an ineffective assistance claim in the CCA and includes supporting affidavits, the CCA can decide the issue if the facts are not reasonably disputed. If the facts are disputed, the CCA must order an evidentiary hearing before a military judge under *United States* v. *DuBay*, 37 C.M.R. 411 (C.M.A. 1967), to establish the facts before the CCA can decide the ineffective assistance issue. *See United States* v. *Denedo*, 129 S. Ct. 2213, 2229 (2009) (Roberts, C.J., concurring in part and dissenting in part) (describing *DuBay* procedure); *United States* v. *Ginn*, 47 M.J. 236, 248 (C.A.A.F. 1997).

This Court granted certiorari to consider whether the President was empowered to prescribe aggravating factors in capital cases prosecuted under the UCMJ. The Court affirmed the judgment of the CAAF. 517 U.S. at 751-752, 773-774.

4. "If the sentence of [a] court-martial extends to death, that part of the sentence providing for death may not be executed until approved by the President." 10 U.S.C. 871(a). The President has not yet approved petitioner's sentence. Pending presidential review and approval, petitioner has filed a number of collateral attacks on his court-martial conviction and sentence.

In August 1996, petitioner filed a petition for extraordinary relief in the Army CCA, arguing that the triggerman aggravating factor had been constitutionally deficient. The Army CCA denied relief, and the CAAF affirmed. 47 M.J. 438, 440, 441, cert. denied, 525 U.S. 1040 (1998). Before seeking review in this Court, petitioner also filed an untimely petition for reconsideration directly with the CAAF, asking that court to revisit its original decision in the case in light of a later decision. The CAAF denied that petition. 49 M.J. 387.

In 2001, petitioner filed a motion with the CAAF seeking permission to file an untimely petition for reconsideration of the court's 1994 decision on the theory that the CAAF had misconstrued the prejudice prong of the test for ineffective assistance of counsel established by *Strickland* v. *Washington*, 466 U.S. 668 (1984). The CAAF granted the motion to file the petition out of time, but it denied the petition on the merits. 54 M.J. 459, cert. denied, 534 U.S. 949 (2001).

In 2003 and 2004, petitioner filed petitions for writs of coram nobis under the All Writs Act, 28 U.S.C. 1651(a), with the CAAF. The second petition contended

that the CAAF had erred in rejecting his ineffective-assistance claim and relied on this Court's decision in *Wiggins* v. *Smith*, 539 U.S. 510 (2003). Pet. App. 5a. Petitioner contended that, as in *Wiggins*, his defense counsel had failed to present important evidence of his troubled childhood, and he resubmitted the affidavits that he had submitted on direct appeal. The CAAF denied the writ on procedural grounds, but ruled that petitioner could raise his ineffective assistance claim by filing a petition for a writ of habeas corpus in the CAAF. 62 M.J. at 236. Although the government contended that the CAAF would lack jurisdiction over any such petition for an extraordinary writ because petitioner's conviction had become final, the CAAF concluded that petitioner's conviction would not become final until approved by the President, see *id.* at 239, 244, and that it therefore had jurisdiction to entertain a habeas petition under the All Writs Act, *id.* at 246.

In February 2006, petitioner filed with the CAAF a petition for a writ of habeas corpus that raised, among other things, the ineffective-assistance claim based on *Wiggins*. See Pet. for Extraordinary Relief 34-69. The court of appeals decided to exercise its "discretion[]" to order a *DuBay* hearing, see note 3, *supra*, to develop an evidentiary record on petitioner's claim. 64 M.J. 132, 146-147; see *id.* at 141-152. The CAAF directed the military judge conducting the *DuBay* hearing to, among other things, assess the reliability and credibility of petitioner's affidavits from his family members. *Id.* at 152-153.

5. Petitioner presented numerous witnesses and evidence at the *DuBay* hearing. Four of petitioner's family members testified about petitioner's background: his sisters Wendolyn and Gwendolyn Black, his brother

Harryl Loving, and his aunt Alline Anderson. Wendolyn Black and Harryl Loving had testified at the court-martial and submitted affidavits in the 1993 CAAF proceedings. Janet Vogelsang, a social worker, also testified at the *DuBay* hearing, and petitioner also introduced her written biopsychosocial assessment into evidence. Finally, petitioner presented records from the New York State Department of Social Services about services and visits provided to his family from 1967 to 1985, as well as some medical records related to petitioner's birth and pediatric care. Pet. App. 34a. Petitioner's mother did not testify because she had died since the direct appeal; Ronald Loving, who had testified and provided an affidavit on direct review, refused to appear or to testify. *Id.* at 34a-35a & n.10.

The military judge entered findings of fact and conclusions of law recommending that the CAAF deny habeas relief. Pet. App. 79a-105a. He found that petitioner's defense counsel had conducted an adequate investigation and had been generally aware of the factual information, later developed in detail at the *DuBay* hearing, about petitioner's childhood (although not "all of the specific details of violence in [petitioner's] family home and neighborhood"). *Id.* at 94a, 98a-99a, 104a. The military judge also concluded that petitioner was not prejudiced by the omitted troubled-childhood evidence. *Id.* at 104a-105a.

The military judge also made findings about witness credibility. Although he found the testimony of the family members at the *DuBay* hearing to be "generally credible and reliable," Pet. App. 99a, he concluded that several of the affidavits submitted to the CAAF during the direct appeal were not credible (and, indeed, in some instances did not even represent the views of the affi-

and). See *id.* at 100a-101a. The military judge also found the affidavits of petitioner's trial counsel, which had been submitted to the CAAF in 1993 in connection with petitioner's ineffective-assistance claim, to be credible and corroborated by trial counsel's testimony at the *DuBay* hearing. *Id.* at 101a.

6. The CAAF denied habeas relief. Pet. App. 1a-78a.

a. Even assuming (without deciding) that counsel's investigation of mitigating evidence was deficient, Pet. App. 16a, and reviewing *de novo* the military judge's conclusions as to prejudice, *id.* at 17a, the CAAF concluded that petitioner had failed to show that he had experienced any prejudice, as necessary under *Strickland* for relief on an ineffective-assistance claim. *Id.* at 17a-48a.

The CAAF noted that petitioner had presented substantial mitigating evidence at trial; the court members were instructed on 19 separate mitigating factors. Pet. App. 22a-24a ("This is not a case where the record of trial was devoid of mitigation evidence at sentencing."). In addition to mitigating evidence to show that petitioner had been under his girlfriend's sway at the time of the murders, *id.* at 24a, "[e]vidence of [petitioner's] family and social background was also prominent in the mitigation case." *Id.* at 24a-25a. Petitioner's impoverished and abusive childhood was addressed by numerous witnesses, including petitioner's parents, siblings, and others. *Id.* at 26a; see *id.* at 26a-33a (discussing the mitigating evidence presented at trial in detail). "The evidence adduced during the *DuBay* hearing," which included testimony by two witnesses who had testified at trial, "was largely cumulative of the type of information presented to the [court] members at trial." *Id.* at 45a.

"[T]he members were aware that [petitioner's] childhood environment and family life were scarred by alcoholism, drugs, family violence, neighborhood violence, school violence, and gang violence." *Id.* at 47a. Although some evidence was presented for the first time at the *DuBay* hearing, the court concluded that it either did not "differ[] in kind or degree" from the trial evidence, or was not "sufficiently compelling as to establish prejudice in this case." *Id.* at 46a.

The court also noted that the aggravating evidence in this case was "overwhelming." Pet. App. 46a. The court explained that petitioner had committed two separate murders, each time shooting the victim in the back of the head even after the victim handed over his money as petitioner demanded. Petitioner had also tried to kill a third victim, who survived only because he was able to wrest the gun from petitioner. *Id.* at 46a-47a. In light of the considerable evidence in aggravation, the court was "convinced beyond a reasonable doubt that [even] if the members had been able to place the additional evidence adduced during the habeas proceedings on the mitigating side of the scale," there was no "reasonable probability that at least one member [of the court-martial] would have struck a different balance." *Id.* at 48a.

b. Judge Effron joined the court's opinion but filed a separate concurrence to note his previously expressed view with respect to an unrelated issue. Pet. App. 49a.

c. Judge Stucky concurred in part and in the result. Pet. App. 49a-56a. He agreed that petitioner had failed to show prejudice, *id.* at 49a, and concluded that petitioner had also failed to establish that his counsel rendered deficient performance, *id.* at 53a-56a. Judge Stucky therefore would have denied relief under both prongs of the *Strickland* test.

d. Judge Ryan dissented and would have dismissed the habeas petition for lack of jurisdiction. Pet. App. 57a-78a. In her view, the CAAF had erred in its 2005 ruling that it could exercise jurisdiction under the All Writs Act.[4] She would have held that the All Writs Act "does not authorize [the CAAF] to entertain a collateral attack through a habeas corpus petition that is not part of the direct review authorized by statute." *Id.* at 67a-68a. She contrasted the relief sought by petitioner with coram nobis relief, which this Court had recently held that the CAAF may grant, see *United States* v. *Denedo*, 129 S. Ct. 2213 (2009): coram nobis relief corrects an error in a previous proceeding and is considered an "extension" of that proceeding, whereas a petition for habeas relief commences a new civil proceeding. Pet. App. 69a. Judge Ryan concluded that habeas corpus could be available to petitioner only in an Article III court. *Id.* at 70a-74a.

7. Following the denial of habeas relief, petitioner filed a petition for reconsideration in which, for the first time, he urged the CAAF to set aside his death sentence on the ground that the passage of time between his first presentation of his ineffective-assistance claim on direct appeal and his *DuBay* hearing amounted to a denial of the right to a speedy appeal and a deprivation of due process. The CAAF summarily denied the petition. Pet. App. 106a-107a.

ARGUMENT

Petitioner contends (Pet. 23-36) that the decision of the court of appeals to grant him a new evidentiary hearing on the ineffective-assistance claim it had previ-

[4] Judge Stucky also noted that he had "concerns similar to" Judge Ryan's. Pet. App. 49a.

ously rejected was so long in coming that it deprived him of due process and warrants habeas relief from his death sentence. This Court lacks jurisdiction to entertain that claim, because the statute governing certiorari review of the CAAF's judgments does not extend to a denial of an extraordinary writ. Even if this Court had jurisdiction, further review would not be warranted. Petitioner failed to preserve his speedy appeal claim in his merits briefing in the court of appeals, and that court's summary order denying his petition for reconsideration does not conflict with any decision of another court of appeals or any decision of this Court.

1. This Court lacks jurisdiction to review the decision below. Pursuant to 28 U.S.C. 1259, this Court has jurisdiction to review, by writ of certiorari, only four specified categories of "[d]ecisions of the [CAAF]." The only potentially relevant category is set out in 28 U.S.C. 1259(4), which confers jurisdiction to review "[c]ases * * * in which the [CAAF] granted relief."[b] See Pet. I & n.1. But the instant decision "denied" petitioner's habeas corpus petition on the merits; it did not grant petitioner any relief. Pet. App. 48a.

The CAAF's previous decision to order a *DuBay* evidentiary hearing on petitioner's ineffective-assistance claim, see 64 M.J. at 152-153, likely did grant partial "relief" to petitioner that would have permitted the *gov-*

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[b] The other three categories consist of decisions by the CAAF reviewing a judgment by a service Court of Criminal Appeals affirming a death sentence; decisions in cases certified to the CAAF by a service Judge Advocate General; and decisions in cases in which the CAAF granted the accused's petition for review of a CCA decision. See 28 U.S.C. 1259(1)-(3); see also 10 U.S.C. 867(a)(1)-(3). None of those statutory provisions applies here: the CAAF was considering a habeas corpus petition filed directly in that court, not an appeal from a CCA.

cranent to seek review pursuant to Section 1259(4). See *United States* v. *Denedo*, 129 S. Ct. 2213, 2219-2220 (2009) (holding that a decision remanding to the Navy-Marine Corps CCA "granted relief" because it provided some "redress or benefit"). But the 2006 decision was not adverse to petitioner, no party sought review of it in any event, and the time for seeking review of that decision has long since passed. This Court's holding in *Denedo* that "relief" includes "partial relief," *id.* at 2220, thus is of no benefit to petitioner. And contrary to petitioner's reading, Section 1259(4) does not confer certiorari jurisdiction over every subsequent decision in any case in which the CAAF has previously ordered a *DuBay* hearing. Rather, Section 1259(4) is most sensibly read to confer jurisdiction to review "[d]ecisions" to "grant[] relief." And petitioner seeks review of a decision that denied relief.

Indeed, because petitioner did not preserve his due process claim in his principal briefs and the CAAF therefore did not address it in its opinion, petitioner is in reality seeking review of the CAAF's order denying his petition for reconsideration. Even if, once the CAAF grants some form of partial relief, Section 1259(4) could be read to confer jurisdiction over every subsequent decision on the merits, it is implausible to conclude that Section 1259(4) confers jurisdiction over every subsequent procedural order in that case. See H.R. Rep. No. 549, 98th Cong., 1st Sess. 16-17 (1983) (noting that out of concern for this Court's docket, Section 1259 was carefully drafted not to confer jurisdiction over a "substantial" number of new petitions); cf. 10 U.S.C. 867a (precluding certiorari review of an action by the CAAF "in refusing to grant a petition for review").

2. The questions presented would not warrant an exercise of this Court's jurisdiction in any event, because petitioner did not timely raise his due process or speedy appeal theories before the CAAF, either in his petition for extraordinary relief or in the supplemental briefing that the CAAF invited following the *DuBay* hearing. Instead, petitioner first raised those theories in his petition for reconsideration following the CAAF's denial of his habeas petition.[6] Petitioner's failure to preserve the issue is alone sufficient reason to deny further review. Cf. *Wills* v. *Texas*, 511 U.S. 1097, 1097 (1994) (O'Connor, J., concurring in denial of certiorari) ("It has been the traditional practice of this Court * * * to decline to review claims raised for the first time on rehearing in the court below. Following this practice here makes good sense because we do not have the benefit of a decision analyzing the application of [the constitutional rule] to the facts of petitioner's case.") (citation omitted). Because the CAAF denied reconsideration in a summary order, Pet. App. 106a-107a, that disposition does not conflict with any other appellate decision. See Sup. Ct. R. 10.

Plenary review would be particularly unsuitable here. As petitioner acknowledges (Pet. 27), precedent of the CAAF agrees with his submission that the Constitution protects a speedy appeal right; at most, the court here can be said to have rejected the claim for procedural reasons or on its facts. This case thus presents no

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[6] Even then petitioner's theory was different: whereas petitioner now argues that the delay entitles him to a presumption of prejudice on his ineffective-assistance claim, see, *e.g.*, Pet. i, he did not make that argument in the CAAF. Instead, he argued that the delay was itself a violation of due process that required setting aside his death sentence. Pet. for Recons. 10, 20, 23.

occasion to consider the theoretical viability of constitutional speedy appeal claims. Nor should this Court now undertake the sort of fact-intensive recapitulation of each phase of the protracted proceedings of petitioner's case, and the reasons for the timing of each phase, that would be necessary to reconstruct and review the court of appeals' determination. Cf., *e.g.*, *Montejo* v. *Louisiana*, 129 S. Ct. 2079, 2092 (2009) (declining to resolve unclear factual issues for the first time on certiorari review).

3. Petitioner's claim lacks merit in any event. The CAAF in 1994 squarely rejected petitioner's ineffective-assistance claim; in the proceedings below, it agreed to reopen that decision and allow petitioner to challenge it at an extensive evidentiary hearing. After that hearing, the court concluded that petitioner had not met his burden of establishing prejudice, a conclusion that petitioner does not dispute in this Court. Instead, petitioner now contends that the CAAF took an unconstitutionally long time to hear his collateral challenge and that, as a result, he is entitled to relief even though no court — whether in 1994 or 2009 — has ever concluded that petitioner has met either prong of the *Strickland* standard. Petitioner's claim lacks any support in the decisions of this Court or any other court of appeals. Further review is not warranted.

a. Petitioner's contention depends on the notion that this Court should review his claim "as though the current action, although filed as an extraordinary writ, was part of [petitioner]'s mandatory appeal." Pet. 26. That premise is fundamentally flawed.

Pursuant to the CAAF's statutory obligation in capital cases, 10 U.S.C. 867(a)(1), petitioner received full and thorough consideration of his ineffective-assistance

claim on direct appeal in 1994. The CAAF rejected that claim on its merits. See 41 M.J. at 259. Seven years later, petitioner then sought and was granted leave to file an untimely petition for reconsideration of his direct appeal based on this Court's decision in *Williams* v. *Taylor*, 529 U.S. 362 (2000), which analyzed a claim of ineffective assistance based on failure to investigate mitigating evidence. The CAAF took the extraordinary step of permitting petitioner to file a reconsideration petition years after it was due, and it denied reconsideration on the merits. 54 M.J. at 459. Accordingly, the CAAF more than adequately protected any right that petitioner had to the speedy and complete consideration of his appeals as of right.

The instant proceeding, based on a petition for an extraordinary writ that petitioner filed in 2007, forms no part of the appellate process. "Postconviction relief is even further removed from the criminal trial than is discretionary direct review. It is not part of the criminal proceeding itself * * *. It is a collateral attack that normally occurs only after the defendant has failed to secure relief through direct review." *Pennsylvania* v. *Finley*, 481 U.S. 551, 556-557 (1987). And as petitioner notes (Pet. 25), claims that in the federal system would be reviewed in collateral proceedings, such as ineffective-assistance claims, are considered on direct review in the military courts. See note 3, *supra*. Any such claim that the CAAF examines on habeas therefore is necessarily one that could be (and here was) already examined on direct review. Petitioner cites no case establishing a due process right to speedy handling of a habeas petition—let alone one seeking re-examination of a claim already timely resolved on direct appeal.

Moreover, petitioner appears to contend that the Due Process Clause requires not only a prompt resolution of a claim seeking re-examination of a conviction on habeas review, but also an evidentiary hearing. See Pet. 25-27. That contention lacks merit. Evidentiary hearings in collateral proceedings have never been a matter of right. See, *e.g.*, *Schriro* v. *Landrigan*, 550 U.S. 465, 473-474 (2007). Rather, they have been left largely to the sound discretion of the tribunal, see *id.* at 473, and here the CAAF exercised its discretion, see 64 M.J. at 146-147, to grant petitioner such a hearing on collateral review.

Finally, as petitioner acknowledges (Pet. 23), due-process challenges to the military justice system are reviewed with "particular deference to the determination of Congress, made under its authority to regulate the land and naval forces." *Weiss* v. *United States*, 510 U.S. 163, 177 (1994) (quoting *Middendorf* v. *Henry*, 425 U.S. 25, 43 (1976)). Thus, for instance, in the military context, the Due Process Clause does not even require the appointment of counsel in all court-martial proceedings. See *Middendorf*, 425 U.S. at 44-48.[7] The CAAF's handling of petitioner's postconviction petition can hardly be said to violate that highly deferential standard.

b. Even if petitioner were correct that his argument should be analyzed under the rubric of speedy appeal cases, those cases offer him no support here. Although the courts of appeals have analyzed speedy appeal claims in different ways, petitioner cites no case treating the failure to provide a speedy appeal as a sufficient ground for setting aside a conviction or sentence.

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[7] Petitioner has been represented by appointed counsel throughout the proceedings, both on direct review and on his numerous applications for extraordinary relief.

"A defendant who has been convicted of a crime no longer enjoys a presumption of innocence." *United States* v. *DeLeon*, 444 F.3d 41, 59 (1st Cir. 2006) (citing *Herrera* v. *Collins*, 506 U.S. 390, 399 (1993)). Delays in processing a defendant's appeal from such a conviction do not suggest any invalidity in the conviction itself. They certainly do not suggest that the defendant should be relieved of proving prejudice, an essential element of an attack on a conviction based on constitutionally ineffective assistance of counsel. See *Strickland* v. *Washington*, 466 U.S. 668, 692-693 (1984).

Petitioner's cases finding constitutional speedy appeal violations (Pet. 27 n.15), therefore, focus on remedying those violations by ensuring that the appeal is heard; once the appeal *is* heard and decided on the merits, as petitioner's ineffective-assistance claim has been, petitioner identifies no case holding that past delay itself actually entitles the defendant to release.[*] See, *e.g.*, *Cody* v. *Henderson*, 936 F.2d 715, 722-723 (2d Cir. 1991) (reversing grant of release based on speedy appeal deprivation); *United States* v. *Hawkins*, 78 F.3d 348, 351, 352 (8th Cir.) (speedy appeal claim failed because underlying appellate issues were meritless), cert. denied, 519 U.S. 844 (1996); see also *Simmons* v. *Reynolds*, 898 F.2d 865, 869 (2d Cir. 1990) (suggesting that once the appeal proceeds, a speedy appeal violation "is more appropriately remedied by a suit for damages"); *Rheuark* v.

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[*] In *Burkett* v. *Cunningham*, 826 F.2d 1208 (3d Cir. 1987), the State conceded that "the only appropriate remedy" was dismissal when the federal courts found that the *trial* court had engaged in numerous forms of unconstitutional delay that also impeded the defendant from bringing an appeal. *Id.* at 1211.

Shaw, 628 F.2d 297 (5th Cir. 1980) (damages action), cert. denied, 450 U.S. 931 (1981).[9]

Petitioner identifies (Pet. 34-35) one case in which a 13-year delay in hearing a direct appeal, which left a jury-selection claim essentially unreviewable because of the intervening loss of pertinent transcripts, caused a federal court to presume that the underlying constitutional claim was meritorious and grant habeas relief. *Simmons* v. *Beyer*, 44 F.3d 1160, 1170-1171 (3d Cir.), cert. denied, 516 U.S. 905 (1995). This case is altogether different, not only because there was no delay in the resolution of petitioner's direct appeal, but also because during his appeal petitioner was actually able to present evidence that he now complains is unavailable for collateral proceedings (such as testimony from witnesses who have since died).

In this case, petitioner attacks not the delay in hearing his ineffective-assistance claim, but the delay in reconsidering it. That puts petitioner's claim far afield from one truly challenging a denial of a speedy appeal; petitioner's real quarrel is with the outcome of the CAAF's 1994 resolution of his ineffective-assistance claim, not with the timing of subsequent proceedings. See Pet. 32 (delay was caused by the CAAF's "inadequate review in 1994"). The CAAF was under no obligation to hold an evidentiary hearing to reconsider that 1994 decision; the fact that it did so does not trigger some new form of speedy adjudication analysis.

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[9] Several of petitioner's cases do not deal with the constitutional issue at all, but rather with whether to excuse the statutory exhaustion requirement for federal habeas petitions due to delay in the state appellate courts. See, *e.g.*, *Coe* v. *Thurman*, 922 F.2d 528 (9th Cir. 1990); *Harris* v. *Champion*, 15 F.3d 1538 (10th Cir. 1994).

c. There is some disagreement in the courts of appeals concerning whether to review speedy appeal claims under petitioner's preferred standard (Pet. 28), which is borrowed from the speedy trial analysis of *Barker* v. *Wingo*, 407 U.S. 514 (1972). Compare, *e.g.*, *United States* v. *Sanders*, 452 F.3d 572, 578 (6th Cir. 2006), cert. denied, 550 U.S. 920 (2007), and *United States* v. *Johnson*, 732 F.2d 379, 381-382 (4th Cir.), cert. denied, 469 U.S. 1033 (1984), with *DeLeon*, 444 F.3d at 58-59, and *Cody*, 936 F.2d at 719. This case presents no occasion to take up that issue, because even under the standard petitioner prefers, petitioner cannot establish a violation. The four factors of the *Barker* speedy trial analysis are the length of the delay, the reason for the delay, whether the defendant timely asserted his right, and prejudice to the defendant. 407 U.S. at 530. Applying those factors yields no constitutional violation here.

Within approximately two years after petitioner's sentencing, his first appeal had been briefed, argued, and decided by the Army CMR; petitioner had added new assignments of error; and the Army CMR had denied relief on those new claims in a supplemental opinion. See 34 M.J. at 956; 34 M.J. at 1065, 1066; Pet. 5. His second appeal was briefed and argued in the CAAF within 18 months thereafter; the CAAF decided the case just over a year later. 41 M.J. at 213. Those time periods are neither unreasonable nor unusual in capital litigation; petitioner raised 70 issues on appeal to the CAAF, which caused the CAAF to write a 113-page opinion in affirming the judgment. Moreover, the military courts considered petitioner's ineffective-assistance claims, and the attendant factual submissions, on direct review.

Even if the period following direct review in the military courts should count in the analysis, the delays generally were attributable to petitioner and to the court system. For example, petitioner spent two years pursuing direct review in this Court on questions not related to his ineffective-assistance claim. After this Court disposed of those issues, lengthy periods ensued when petitioner either was pursuing no relief (between this Court's denial of a third certiorari petition in October 2001 and the filing of a petition for extraordinary relief in April 2003); was pursuing other theories of relief (proceedings for extraordinary relief on a sentencing issue between September 1996 and December 1998); or was pursuing the ineffective-assistance theory in a procedural posture (coram nobis) that the CAAF subsequently found was improper (between April 2003 and December 2005).[10]

Nor is there any basis for applying a presumption of prejudice based on the length of these time periods, or the total time. See Pet. 28-29. Even before trial, if the government acts with "reasonable diligence," there is no presumption of prejudice "however great the delay." *Doggett* v. *United States*, 505 U.S. 647, 656 (1992). And petitioner identifies no "negligence" on the government's part. See *id.* at 657; see also *United States* v. *Loud Hawk*, 474 U.S. 302, 316 (1986).[11]

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[10] To the extent that petitioner argues that delay caused by his own attorneys is not chargeable to him, see Pet. 30 (citing *United States* v. *Moreno*, 63 M.J. 129, 138 (C.A.A.F. 2006)), this Court rejected that notion in *Vermont* v. *Brillon*, 129 S. Ct. 1283, 1293 (2009).

[11] Petitioner does not contend that the delay in adjudicating his ineffective-assistance claim has caused him undue anxiety or resulted in oppressive incarceration. Even if petitioner's death sentence were to

Finally, as petitioner admits (Pet. 33), he never complained to the military courts that they were not resolving his case with sufficient speed. Merely filing numerous requests for relief is not the same thing as asserting a constitutional right to prompt review. See, *e.g.*, *Loud Hawk*, 474 U.S. at 314-315. That factor, too, weighs against petitioner in the *Barker* analysis.

4. Petitioner does not present any question concerning whether he is entitled to relief under the Sixth Amendment if he is not entitled to some sort of presumption of prejudice based on the passage of time. Pet. i. That underlying constitutional claim is without merit in any event.

First, the CAAF found in 1994 that petitioner had not established that his attorneys performed deficiently, and the CAAF did not revisit that analysis in this case. Pet. App. 16a (assuming without deciding that petitioner could show deficient performance). Concurring Judge Stucky further explained why petitioner received constitutionally effective counsel at the penalty phase. *Id.* at 53a-56a. Petitioner's counsel conducted an appropriate investigation; in their search for mitigating evidence "[t]hey interviewed [petitioner] extensively, visited his hometown, spoke to family, friends, teachers, law enforcement officials, and the community center boxing coach." *Id.* at 55a-56a. Counsel's decision not to present some of the evidence they uncovered was a reasonable tactical judgment. *See id.* at 93a-94a, 95a-96a.

Second, petitioner cannot establish prejudice. The aggravating evidence in this case was "overwhelming." Pet. App. 46a. The court of appeals recognized and car-

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be set aside on Sixth Amendment grounds, any retrial of the penalty phase would still result in at least a term of life imprisonment.

ried out its duty to reweigh the aggravating evidence against the totality of the available mitigating evidence, including the evidence that petitioner contends should have been adduced, to see whether there is a reasonable probability that the outcome would have been different had counsel acted differently. *See Wiggins* v. *Smith*, 539 U.S. 510, 534, 536 (2003); *Williams*, 529 U.S. at 397-398; *Strickland*, 466 U.S. at 695; accord *Sears* v. *Upton*, No. 09-8854 (June 29, 2010) (per curiam), slip op. 11. The court of appeals was "convinced beyond a reasonable doubt that if the members [of the court-martial] had been able to place the additional evidence adduced during the habeas proceedings on the mitigating side of the scale, [there was no] reasonable probability that at least one member would have struck a different balance." Pet. App. 48a.[7]

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[7] Because the court of appeals correctly applied the standard for assessing prejudice, nothing in this Court's recent summary disposition in *Sears*, *supra*, casts doubt on its decision. The court of appeals contrasted the substantial mitigating evidence presented in petitioner's case with cases such as *Wiggins* and *Williams*, Pet. App. 42a-43a, but unlike the state court in *Sears*, the court of appeals did not suggest that the presentation of some mitigating evidence at trial pretermitted the inquiry into prejudice on postconviction review. *See Sears*, slip op. 10-11; Pet. App. 42a-48a. And in this case, unlike in *Sears*, no court has found that counsel's investigation of mitigating evidence was "facially deficient," *Sears*, slip op. 10.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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IN THE

Supreme Court of the United States

DWIGHT J. LOVING,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

REPLY BRIEF

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ARGUMENT

The narrow issue raised by this death-sentenced Petitioner concerns the court of appeals' acknowledgment of its own failure to properly address an ineffective assistance of counsel claim on direct review in 1994, and then its subsequent compounding of that error by failing to recognize the prejudice to Private Loving in his ability to present extenuation or mitigation evidence in support of his claim almost nineteen years after his original capital court-martial sentencing proceeding. The court of appeals found that "[p]etitioner has produced post-trial material which raises substantial questions about the reasonableness of the investigation upon which our 1994 decision rested." *Loving v. United States*, 64 M.J. 132, 152 (C.A.A.F. 2006). Yet when considering a habeas petition arguing that Loving's 1989 capital sentencing was flawed in a fundamental respect by ineffective representation, the court of appeals ordered an evidentiary hearing, and considered its findings, without any presumption of prejudice arising from the fact that material witnesses had died, become unavailable, or had their memories ravaged by time.

It is because of the court of appeals' acknowledgment that "the documents to support and raise the issue of ineffective assistance of counsel were originally filed at this Court while the case was pending on direct review," 64 M.J. at 146 (footnote omitted), that this is not a run of the mill habeas matter. Rather, the questions presented are at an extreme end of the spectrum of ineffective assistance of counsel cases in which a court has gone so far as to

admit inadequacies in its own earlier appellate consideration of an important issue bearing on a death sentence.

Unlike the government's incorrect characterization of the issues presented, Private Loving is not arguing in this appeal that the lengthy delay in proper consideration of his ineffective assistance of counsel claim entitles him to release. (Opp'n Br. 19.) Instead, Loving points to his inability in a habeas proceeding, delayed for more than a decade due solely to the Court's inadequate review of the issue during direct appeal, to adequately present extenuation or mitigation evidence in order to establish that he was prejudiced by counsel's failure to adequately investigate and present such evidence in his capital sentencing. At the heart of the issues here is Loving's ability to argue life versus death, not punishment versus release.

The jurisdiction of this Court to review the decision of the court of appeals is clear in view of *United States v. Denedo*, 129 S. Ct. 2213, 2219-20 (2009). The issues before the Court in this appeal were argued, preserved, and are ripe for consideration. The government's contentions to the contrary lack merit, and the decision below warrants review and should be vacated in light of the most basic tenets of due process.

A. This Court Has Jurisdiction.

Respondent reads qualifications and limitations into this Court's holding in *Denedo* that, in déjà vue fashion, again foist on the Court an implausibly "parsimonious construction of the word 'relief'," 129 S.

Ct. at 2219, to argue that this Court lacks jurisdiction under 28 U.S.C. § 1259(4) (2006). If the court of appeals' decision to order a *DuBay* evidentiary hearing "conferred a palpable benefit" on petitioner, which it unquestionably did despite the flaw in the relief afforded, then *Denedo* counsels that such "relief" is sufficient for this Court's jurisdiction under Section 1259(4) to attach.

This Court has jurisdiction under Section 1259(4) to review decisions "in which the Court of Appeals for the Armed Forces granted relief." It cannot be denied that the court of appeals' decision to consider anew the strength of extenuation or mitigation evidence to be weighed in capital sentencing, by ordering an evidentiary hearing before a military judge, conferred upon Private Loving "a chance of success on the merits, however slight . . . superior to no possibility at all." 129 S. Ct. at 2220. That hearing, conducted in part over Loving's objections based on the prejudice arising from the loss of critical evidence due to the lengthy passage of time before the hearing, resulted in new findings of fact and conclusions of law which were returned to the court of appeals for consideration.

What matters here is not, as the government contends, that the court of appeals denied Loving's habeas petition. Rather, what matters is the very basis upon which the court of appeals' decision rested—the findings of fact and conclusions of law from a military judge (1) who presided over a newly ordered evidentiary hearing that was fundamentally flawed in design and (2) whose ultimate findings and

conclusions were colored by that flaw to the detriment of Private Loving.

Were this Court to lack jurisdiction in this case, the consequences would be perverse. The court of appeals could order an evidentiary hearing conducted outside the most basic protections of the Constitution, with no means for the ultimately harmed party to contest the validity of that proceeding in this Court. Section 1259(4) should not be read to permit such circumvention of the Constitution. Instead, a well-reasoned reading of the statute, as already instructed by this Court in *Denedo*, is that "relief" as referenced therein "encompasses any 'redress or benefit' provided by a court." 129 S. Ct. at 2219. The court of appeals granted such relief to Loving by ordering a new evidentiary hearing. Unfortunately, the design of that benefit was destined to have repercussions that prejudiced Loving from the moment the benefit was conferred. Surely, if a party is not satisfied with the very "relief" a court provides, appeal rightfully may be taken.

The time for seeking review related to the court of appeals' 2006 decision to order a *DuBay* evidentiary hearing has not long since passed, as argued by the government. (Opp'n Br. 14.) The military judge who followed that court's order to conduct the hearing had an independent opportunity to evaluate and issue findings of fact and conclusions of law subject to a presumption of evidentiary prejudice, because prejudice due to the passage of time clearly had occurred. This he did not do. While the "relief" provided by the new collection and weighing of evidence provided Loving with a chance of

success on the merits, that relief was only "partial" and not "ultimate" or "complete" for the obvious reason that the subject proceeding was flawed in design. But the partial relief provided by the grant and conduct of the evidentiary hearing, as well as the issuance of findings and conclusions therefrom, was enough to be "relief" within the meaning of that term as decided in *Denedo*, and thus to be within the jurisdiction of this Court.

Still further, as to whether only the government has a right to appeal with respect to the relief provided by the court of appeals, Opp'n Br. 13-14, there were potentially *two* aggrieved parties. Private Loving was the other. That the government had no need to appeal because the habeas petition ultimately was denied is of no import here.

Nor was the court of appeals' order to conduct a *DuBay* hearing merely procedural in nature, as suggested by the government. (Opp'n Br. 14.) The *DuBay* judge was ordered to enter findings of fact and conclusions of law concerning each of the following:

> 1. Identify potential sentencing evidence, if any, alleged by the defense that was omitted or incompletely presented at trial.
>
> 2. Address the facts, if any, under (1) that would have been developed through a reasonable investigation by a competent attorney under Strickland. In this regard, what

did trial defense counsel do to investigate information to present in the capital sentencing phase of the court-martial? What information, if any, did the counsel know or should have known that would have triggered an investigation into Petitioner's traumatic background or the omitted or incomplete evidence identified under (1)?

3. What impact did any deficiency in investigating this case, if any, have on tactical decisions made by trial defense counsel (including the decision to use or not to request or to use any expert assistance)? Whether any information identified under (1) could have led to a change in defense counsel's trial tactics in sentencing phase?

4. Were trial defense counsel aware of the information contained in Petitioner's affidavits filed at this Court regarding violence in Petitioner's family home and neighborhood? The *DuBay* hearing will evaluate the credibility and reliability of all factual information Petitioner has filed with this Court to support his habeas corpus petition.

5. The *DuBay* hearing will inquire into any other matters that relate to the issue of performance of trial defense counsel of the duty to

> conduct a reasonable investigation into the background of Petitioner, the omitted or incomplete evidence identified under (1), or any other evidence relevant to the capital sentencing proceeding, in light of prevailing professional norms at the time of the trial.
>
> 6. Whether there is a reasonable probability that, but for the omission [of] information identified under (1) through (5), the result of the sentencing proceeding would have been different? This requires a reweighing of the evidence adduced at trial and in the *DuBay* proceeding to determine this question: Had the panel been confronted with this evidence, was there a reasonable probability it would have returned a different sentence? The test is whether there is a reasonable probability that at least one member of the panel would have struck a different balance thereby not voting for a death sentence?

Loving v. United States, 64 M.J. 132, 152-53 (C.A.A.F. 2006). Thus, while it may be "implausible to conclude that Section 1259(4) confers jurisdiction over every subsequent procedural order," Opp'n Br. 14, this certainly was not an ordinary procedural order.

The government's claim that this Court lacks jurisdiction to hear this appeal cannot be reconciled

with *Denedo*. Moreover, nothing in Section 1259(4) suggests that certiorari review, on Loving's request, is foreclosed due to the type of partial relief that the court of appeals granted nor whether the relief was granted to Loving.

B. Petitioner Preserved His Due Process Claim.

The record below establishes that Loving clearly intended to invoke the Due Process Clause in challenging the failure to apply a presumption of evidentiary prejudice when considering extenuation and mitigation evidence in connection with his habeas petition concerning capital sentencing.

Prior to the court of appeals' order for a *DuBay* hearing to be conducted, Loving's counsel asserted during oral argument that he could not get a full and fair hearing because of the prejudice associated with the passage of time. (Pet. 10.) Again, at the *DuBay* hearing, Loving's counsel argued both before the presentation of witnesses (Pet. 15; C.A. App. 1058) and during closing arguments (Pet. 19; C.A. App. 1694-95) that he suffered prejudice in presenting evidence due to the passage of time.

In his *opening* brief following the *DuBay* hearing, Loving further argued that he was prejudiced due to the passage of time:

> [A]ny discrepancies in the affidavits of Harryl, Wendy, and Gwen and the unavailability of Lucille and Ronnie are simply due to the passage of time. In

> essence rejecting any portion of this information, except the limited portions noted here, would penalize Loving for the delay in conducting the *DuBay* hearing when this Court already held that all of this information, which supported a hearing, was submitted by Loving while on direct appeal and that a hearing should have been granted then.

Petitioner's Brief Following DuBay Hearing at 91, in *Loving v. United States*, C.A.A.F. No. 06-8006/AR. Private Loving also argued:

> Loving continues to assert and does not waive argument that . . . he is essentially being penalized by this Court's failure to order the *DuBay* hearing during the initial mandatory review when *Loving* had submitted the same affidavits and information this Court considered in finally granting the hearing in 2006.

Id. at 97 n.42.

Later, Loving yet again raised the issue that he "has been denied due process of law required by the Fifth Amendment" because he "has been demonstrably prejudiced by the delay, due in no part to his own fault, in affording him a *DuBay* hearing on his claim of ineffective assistance of counsel." Petition for Reconsideration, in *Loving v. United States*, C.A.A.F No. 06-8006/AR at 1 (footnote omitted).

Loving's repeated attempts to have the court of appeals and the *DuBay* judge recognize and address the prejudice he faced are readily apparent. Over and over again, Loving sought to preserve his due process claim on these grounds. This simply is not a case, as the government suggests (Opp'n Br. 15), in which an issue was first raised in a petition for reconsideration or in which a different issue instead was raised.

Still further, to the extent there is any question concerning the adequacy of preservation of Loving's due process claim, all doubt should be resolved in Loving's favor.

"In death cases doubts . . . should be resolved in favor of the accused." *Andres v. United States*, 333 U.S. 740, 752 (1948). "The taking of life is irrevocable. It is in capital cases especially that the balance of conflicting interests must be weighted most heavily in favor of the procedural safeguards of the Bill of Rights." *Reid v. Covert*, 354 U.S. 1, 45-46 (1957) (Frankfurter, J. opinion concurring in judgment); *see also Williams v. Georgia*, 349 U.S. 375, 391 (1955). This Court especially has been unwilling to take a restrictive view of the manner in which due process claims may be raised and preserved below, even in non-capital cases. *See, e.g., Braniff Airways, Inc. v. Nebraska State Bd.*, 347 U.S. 590, 598-99 (1954); *Gibbs v. Burke*, 337 U.S. 773, 779 (1949); *Dyke v. Taylor Implement Mfg. Co.*, 391 U.S. 216, 217 n. 3 (1968).

C. This Court Should Exercise Jurisdiction to Hear and Decide the Questions Presented.

This is not a case in which this Court is being asked to resolve unclear issues for the first time on certiorari review, as the government argues (Opp'n Br. 16). The questions presented address the narrow, unusual circumstance when a court of appeals acknowledges a breakdown in the process of direct review, with potentially dire consequences for the aggrieved party.

The court of appeals recognized that "[p]etitioner did not have an adequate opportunity on direct appeal to establish facts in an evidentiary hearing to support his ineffective assistance of counsel claim," *Loving v. United States*, 64 M.J. 132, 148 (C.A.A.F. 2006) despite the fact that "the documents to support and raise the issue of ineffective assistance of counsel were originally filed at [the court of appeals] while the case was pending on direct review," *id.* at 146 (footnote omitted). But that astonishing acknowledgment is of no consequence if the court of appeals subsequently failed to account for the prejudice flowing from the many years between direct review of Loving's case and the appellate court's order to finally conduct an evidentiary hearing. The failure to apply a presumption of evidentiary prejudice in these circumstances presents a narrow but compelling issue worthy of certiorari review.

CONCLUSION

For the reasons given in Loving's petition and this reply, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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